



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

HARVARD LAW LIBRARY



3 2044 066 104 126

USHER A. MOREN
ATTORNEY-AT-LAW

~~JOHN F. SMITH,
417-419 Tremont Bldg.,
Boston, Mass.~~

HARVARD LAW LIBRARY



MASSACHUSETTS REPORTS

129

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS

JUNE 1880 — NOVEMBER 1880

JOHN LATHROP

REPORTER

BOSTON

LITTLE, BROWN, AND COMPANY

1881

Entered according to Act of Congress, in the year 1881, by
LITTLE, BROWN, AND COMPANY,
In the Office of the Librarian of Congress, at Washington.

UNIVERSITY PRESS:
JOHN WILSON AND SON, CAMBRIDGE.

JUDGES
OF THE
SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

HON. HORACE GRAY, CHIEF JUSTICE.

HON. JAMES D. COLT.

HON. SETH AMES.

HON. MARCUS MORTON.

HON. WILLIAM C. ENDICOTT.

HON. OTIS P. LORD.

HON. AUGUSTUS L. SOULE.

ATTORNEY GENERAL.

HON. GEORGE MARSTON.

TABLE

OF THE CASES REPORTED.

Akron Sewer Pipe Co. (Carleton v.)	40	Boston Music Hall v. Cory	435
Albro (Moors v.)	9	Boutwell (Commonwealth v.)	124
American Ins. Co. (Amsinck v.)	185	Boylston Ins. Co. (Amsinck v.)	185
Amsinck v. American Ins. Co.	185	Boylston National Bank (Wood v.)	358
—— v. Boylston Ins. Co.	185	Bradstreet v. Butterfield	339
—— v. New England Ins. Co.	185	Breck v. Blair	127
Backus v. Spaulding	234	Brightman (Terry v.)	535
Baker v. Mayo	517	Brown (Campbell v.)	23
Baldwin (Commonwealth v.)	481	Brown v. McDonald	66
—— v. Union Institution for Savings	559	Burnham (King v.)	598
Barbey (O'Donnell v.)	453	Burns (Cape Ann National Bank v.)	596
Bartlett (McKim v.)	226	Burt (Laws v.)	202
Bassett v. Crafts	513	Butterfield (Bradstreet v.)	339
Batchelder (Way v.)	361	Calnan v. Toomey	451
Blaikie (Gale v.)	206	Campbell v. Brown	23
Blair (Breck v.)	127	Cape Ann National Bank v. Burns	596
Blamey (Stockwell v.)	312	Carleton v. Akron Sewer Pipe Co.	40
Blume (Frampton v.)	152	Carpenter (Home National Bank v.)	1
Boston (Davis v.)	377	Central Congregational Society (Davis v.)	367
—— (Flood v.)	551	Central National Bank (Dickinson v.)	279
—— (French v.)	592	Chamberlain v. Lincoln	70
—— (Knowles v.)	551	Chelsea Savings Bank (Powers v.)	44
—— (Redemptorist Fathers v.)	178	Chicago, Burlington & Quincy Railroad (Isigi v.)	46
—— (Stocum v.)	559	Child v. New York & New England Railroad	170
—— (Union Institution for Savings v.)	82	Chiovaro (Commonwealth v.)	489
Boston & Maine Railroad (Commonwealth v.)	500	Clapp v. Herrick	292
—— (Wright v.)	440	Clark (Robbins v.)	145
Boston Five Cents Savings Bank (Cleaveland v.)	27		
—— (Pierce v.)	425		
Boston Gas Light Co. (Smith v.)	318		

Clarke v. Palmer	373	Drew (Everett v.)	150
Cleveland v. Boston Five Cents Savings Bank	27	Dunbar v. Soule	284
— (Worthen v.)	570	Eaton v. Fitchburg Railroad .	364
Cole v. Newburyport	594	Ely v. Dean	559
Commonwealth v. Baldwin .	481	Emerson v. Patch	299
— v. Boston & Maine Railroad	500	— (Swan v.)	289
— v. Boutwell	124	Estabrook (Turner v.)	425
— v. Chiovaro	489	Everett v. Drew	150
— v. Darling	112	Fairbanks (Massachusetts Gen- eral Hospital v.)	78
— v. Gray	474	Farwell v. Raddin	7
— v. Hamilton	479	Fenno (Wonson v.)	405
— v. Lester	101	Fitchburg Railroad (Eaton v.)	364
— v. Matthews	485	— (Holden v.)	268
— v. —	487	Flanders (Smith v.)	322
— v. Reading Savings Bank	73	Flood v. Boston	551
— v. Sargent	115	Floyd v. Tewksbury	362
— v. Smith	104	Forster v. Forster	559
— v. Wunsch	477	Frampton v. Blume	152
Connecticut River Lumber Co. (Harrigan v.)	580	French v. Boston	592
Cook v. Horton	527	Gale v. Blaikie	206
— (Walker v.)	577	Gifford v. Dartmouth	135
Coolidge v. Dexter	167	Giles (Porter v.)	589
— v. Neat	146	Gill (Lappen v.)	349
— v. Smith	554	Gray (Commonwealth v.) . .	474
Cory (Boston Music Hall v.) .	435	Greer (Whitaker v.)	417
Couillard (Stockwell v.) . .	231	Ham (Stoddard v.)	383
Crafts (Bassett v.)	513	Hamilton (Commonwealth v.)	479
— v. Hunnewell	220	Hanlon v. South Boston Horse Railroad	810
Darling (Commonwealth v.) .	112	Harrigan v. Connecticut River Lumber Co.	580
Dartmouth (Gifford v.) . . .	135	Harrington (O'Neil v.)	591
— (Potter v.)	135	Harwood (McKim v.)	75
Davis v. Boston	377	Hathaway (Teele v.)	164
— v. Central Congrega- tional Society	367	Hayden (Stevens v.)	328
Dean (Ely v.)	559	Hayes v. Nash	62
— (Stearns v.)	139	Herrick (Clapp v.)	292
Dedham Institution for Sav- ings (Stevens v.)	547	Howes v. Rand	519
Dennie v. Smith	143	Heywood (Thompson v.) . . .	401
Deshon (Tucker v.)	559	Higgins (Langmaid v.)	353
Dexter (Coolidge v.)	167	Hill v. Wright	296
Dickason v. Williams	182	Hills v. Home Ins. Co.	345
Dickinson v. Central National Bank	279	Hinckley v. Union Pacific Rail- road	52
Dodge v. Morse	423	Holden v. Fitchburg Railroad	268
Doherty (Roosevelt v.) . . .	301	Holley (Katama Land Co. v.)	540
Dolan v. Thompson	205	Home Ins. Co. (Hills v.) . . .	345

TABLE OF CASES REPORTED.

vii

Home National Bank v. Carpenter	1	McKim v. Bartlett	226
Hopkins v. Shepard	600	—— v. Harwood	75
Horton (Cook v.)	527	McLean (Looney v.)	38
Hoyt v. Jaques	286	Minot v. Taylor	160
Hunnewell (Crafts v.)	220	Mitchell v. Worcester	525
Huntington (National Bank of Commerce v.)	444	Moore (Smith v.)	222
		Moors v. Albro	9
		Morse (Dodge v.)	423
Iasigi v. Chicago, Burlington & Quincy Railroad	46	Nash (Hayes v.)	62
Jacobs (MacMahon v.)	524 n.	National Bank of Commerce v. Huntington	444
Jaques (Hoyt v.)	286	National Bank of the Commonwealth (Talbot v.)	67
Jewett (Tarbell v.)	457	National Rubber Co. v. Sweet	36
Johnson (Reitenbach v.)	316	Neat (Coolidge v.)	146
—— v. Thompson	398	New Bedford (Pierce v.)	534
Jones (Rodgers v.)	420	Newburyport (Cole v.)	594
Katama Land Co. v. Holley	540	New England Ins. Co. (Am-sinck v.)	185
King, petitioner	413	New York & New England Railroad (Child v.)	170
—— v. Burnham	598	North Bridgewater Savings Bank v. Soule	528
Knowles v. Boston	551	O'Brien (Pierce v.)	314
Langmaid v. Higgins	353	O'Donnell v. Barbey	453
Lappen v. Gill	349	Old Colony Railroad (Standish v.)	158
Lathrop v. Page	19	O'Neil v. Harrington	591
Lawrence Manuf. Co. v. Lowell Hosiery Mills	325	Page (Lathrop v.)	19
Laws v. Burt	202	Palmer (Clarke v.)	373
Lester (Commonwealth v.)	101	Patch (Emerson v.)	299
Lincoln (Chamberlain v.)	70	Pells v. Webquish	469
Looney v. McLean	38	Pentecost (Mayhew v.)	332
Loud v. Loud	14	Pierce v. Boston Five Cents Savings Bank	425
Lovering v. Lovering	97	—— v. New Bedford	534
Lowell Hosiery Mills (Lawrence Manuf. Co. v.)	325	—— v. O'Brien	314
Lynn & Boston Railroad (Wills v.)	351	Porter v. Giles	589
MacMahon v. Jacobs	524 n.	Potter v. Dartmouth	135
Manufacturers' National Bank v. Thompson	438	Powers v. Chelsea Savings Bank	44
Massachusetts General Hospital v. Fairbanks	78	Prentice v. Worcester	559
Massachusetts Ins. Co. (Whiting v.)	240	Raddin (Farwell v.)	7
Matthews (Commonwealth v.)	485	Rand (Hewes v.)	519
—— (Commonwealth v.)	487	—— v. Wright	50
Mayhew v. Pentecost	332	Read v. Stewart	407
Mayo (Baker v.)	517	Reading Savings Bank (Commonwealth v.)	73
McDonald (Browne v.)	66		

Redemptorist Fathers v. Boston	178	Tarbell v. Jewett	457
Reitenbach v. Johnson	816	Taylor (Minot v.)	160
Rice (Sanborn v.)	387	Teale v. Hathaway	164
Robbins v. Clark	145	Terry v. Brightman	535
Roberts (Skilton v.)	306	Tewksbury (Floyd v.)	362
Robinson v. Robinson	539	Thayer v. Thayer	189
Rodgers v. Jones	420	—— (Winchester v.)	129
Roosevelt v. Doherty	301	Thompson (Dolan v.)	205
Ross v. Ross	243	—— v. Heywood	401
Sanborn v. Rice	387	—— (Johnson v.)	398
Sargent (Commonwealth v.)	115	—— (Manufacturers' National Bank v.)	438
—— (Stone v.)	503	Toomey (Calnan v.)	451
Sartwell (Woodward v.)	210	Tucker v. Deshon	559
Shepard (Hopkins v.)	600	Tufts v. Tapley	380
Sherwin v. Wigglesworth	64	Turner v. Estabrook	425
Skilton v. Roberts	306	Union Institution for Savings (Baldwin v.)	559
Slocum v. Boston	559	—— v. Boston	82
Smith v. Boston Gas Light Co.	318	Union Pacific Railroad (Hinchley v.)	52
—— (Commonwealth v.)	104	Vass v. Wales	38
—— (Coolidge v.)	554	Wales (Vass v.)	38
—— (Dennie v.)	143	Walker v. Cook	577
—— v. Flanders	322	Way v. Batchelder	361
—— v. Moore	222	Webquish (Pells v.)	469
Soule (Dunbar v.)	284	Whitaker v. Greer	417
—— (North Bridgewater Savings Bank v.)	528	Whiting v. Massachusetts Ins. Co.	240
South Boston Horse Railroad (Hanlon v.)	310	Wigglesworth (Sherwin v.)	64
Spaulding (Backus v.)	234	Williams (Dickason v.)	182
Standish v. Old Colony Railroad	158	Wills v. Lynn & Boston Railroad	351
Stearns v. Dean	139	Winchester v. Thayer	129
Stevens v. Dedham Institution for Savings	547	Wonson v. Fenno	405
—— v. Hayden	328	Wood v. Boylston National Bank	358
Stewart (Read v.)	407	Woodward v. Sartwell	210
Stockwell v. Blamey	312	Worcester (Mitchell v.)	525
—— v. Couillard	281	—— (Prentice v.)	559
Stoddard v. Ham	383	Worthen v. Cleaveland	570
Stone's case	156	Wright v. Boston & Maine Railroad	440
Stone v. Sargent	503	—— (Hill v.)	296
Swan v. Emerson	289	—— (Rand v.)	50
Sweet (National Rubber Co. v.)	36	Wunsch (Commonwealth v.)	477
Talbot v. National Bank of the Commonwealth	67		
Tapley (Tufts v.)	380		

TABLE OF CASES

CITED BY THE COURT.

Ackens v. Winston, 7 C. E. Green, 444	96	Avilla v. Nash, 117 Mass. 318	274
Adams v. Cordis, 8 Pick. 260	324	Ayres v. Waite, 10 Cush. 72	550
— v. Cuddy, 13 Pick. 460	216	Backus v. Spaulding, 116 Mass. 418	239
— v. Tyler, 121 Mass. 380	579	Bacon v. Callender, 6 Mass. 303	563
— v. Way, 33 Conn. 419	91	— v. Fairman, 6 Conn. 121	484
African Merchants v. British Ins. Co. L. R. 8 Ex. 154	187	Badger v. American Ins. Co. 103 Mass. 244	241
Agawam Bank v. Morris, 4 Cush. 99	135	Baker v. Greenhill, 3 Q. B. 148	291
Ahrend v. Odiorne, 118 Mass. 261	24	Ball v. Harris, 4 Myl. & Cr. 264	288
Aikman v. Aikman, 3 Macq. 854	251	Baltimore City Passenger Railway v. Wilkinson, 30 Md. 224	352
Albee v. May, 2 Paine, 74	563	Baltimore & Susquehanna Railroad v. Nesbit, 10 How. 395	566
Albertson v. Landon, 42 Conn. 209	563	Bambaugh v. Bambaugh, 11 S. & R. 191	564
Albro v. Agawam Canal, 6 Cush. 75	273	Bancroft v. Boston & Worcester Railroad, 97 Mass. 275	443
Alden v. Wilkins, 117 Mass. 216	309	Bank of Metropolis v. New England Bank, 1 How. 234	360
Allen v. Archer, 49 Maine, 346	566	— v. — 6 How. 212	360
— v. Holton, 20 Pick. 458	234	Barber v. Root, 10 Mass. 260	248
— v. New Gas Co. 1 Ex. D. 251	278	— v. Roxbury, 11 Allen, 318	535, 595
Allyn v. Boston & Albany Railroad, 105 Mass. 77	443	Barnard v. Eaton, 2 Cush. 294	184
American Bank v. Rollins, 99 Mass. 313	450	Barnett v. Brandão, 6 Man. & Gr. 630	360
Ames v. Foster, 3 Allen, 541	412	— v. — 3 C. B. 519	360
— v. Palmer, 42 Maine, 197	142	Barney v. Lowell, 98 Mass. 570	578
Amherst Bank v. Root, 2 Met. 523	75	Barnum v. Barnum, 42 Md. 251	261
Amory v. Amory, 95 U. S. 186	510	Barringer v. King, 5 Gray, 9	601
Andrews v. Michigan Central Rail- road, 99 Mass. 534	446	Barrow v. West, 23 Pick. 270	450
— v. Southwick, 13 Met. 535	592	Barry v. Page, 10 Gray, 398	305
Angle v. Northwestern Ins. Co. 92 U. S. 330	597	Bartlett v. Bartlett, 14 Gray, 277	26
Anon. Dyer, 304	493	— v. Pearson, 29 Maine, 9	238
Appleton v. Bancroft, 10 Met. 231	309	Bartonshill Coal Co. v. Reid, 3 Macq. 266	271
Arapahoe County v. Kansas Pacific Railway, 4 Dill. 277	512	Basford v. Pearson, 7 Allen, 504	412
Ashford v. Tustin, Lovell's Monthly Digest, 1852, p. 389	257	Bassett v. Crafts, 129 Mass. 513	565
Ashuelot Railroad v. Elliot, 57 N. H. 397	92	Bates v. Kempton, 7 Gray, 382	431
Atherton v. Newhall, 123 Mass. 141	422	Batty v. Fitch, 11 Gray, 184	133
Athol Music Hall v. Carey, 116 Mass. 471	546	Baxter v. Little, 6 Met. 7	237
Attorney General v. Bay State Min- ing Co. 99 Mass. 148	449	— v. Taber, 4 Mass. 361	564
— v. Gardiner, 117 Mass. 492	169	Beal v. Brown, 13 Allen, 114	186
Austin v. Stevens, 24 Maine, 520	563	Bearce v. Bowker, 115 Mass. 129	533
		Becket's case, 2 Woods, 173	523
		Beckwith v. Hartford, Providence & Fishkill Railroad, 29 Conn. 268	91

Beebet v. Pyle, 1 Abbott N. C. 412	523	Burleson v. Shannon, 115 Mass. 498	248
Beekman v. Wilson, 9 Met. 484	440	Burliner v. Royle, 5 C. P. D. 364	522
Bell v. Mayor of New York, 10 Faige, 49	91	Burnham v. Beal, 14 Allen, 217	579
— v. Packard, 69 Maine, 105	246	— v. Noyes, 125 Mass. 85	63
Beloit v. Morgan, 7 Wall. 619	566	Burnhisel v. Firman, 22 Wall. 170	93
Benchley v. Chapin, 10 Cush. 173	460	Burns v. Boston & Lowell Railroad, 101 Mass. 50	443
Bibbith's case, 4 Rep. 436	493	— v. Thayer, 101 Mass. 426	211
Bible Society v. Grove, 101 U. S. 610	512	Burpee v. Sparhawk, 108 Mass. 111	8
Bigelow v. Bigelow, 4 Ohio, 138	465	Burroughs v. Nutting, 105 Mass. 228	287
— v. Boston, 123 Mass. 50	552	Burt v. Merchants' Ins. Co. 115 Mass. 1	65
— v. Gillott, 123 Mass. 102	100	Butler v. Breck, 7 Met. 164	133
— v. Winsor, 1 Gray, 299	46	— v. Mullen, 100 Mass. 453	592
Bird v. Brown, 4 Exch. 786	241	Butterfield v. Western Railroad, 10 Allen, 532	443
Black v. Blazo, 117 Mass. 17	8		
Blackington v. Johnson, 128 Mass. 21	301	Cahill v. Bigelow, 18 Pick. 369	81, 186
Blanchard v. Brooks, 12 Pick. 47	216	Calder v. Bull, 3 Dall. 386	566
Bleaden v. Charles, 7 Bing. 246	59	— v. Haynes, 7 Allen, 387	63
Bloomer v. Waldron, 3 Hill, 381	288	Callander v. Howard, 10 C. B. 290	51
Boardman v. Meriden Britannia Co. 35 Conn. 402	827	Callwell v. Callwell, 3 Sw. & Tr. 259	18
Bond v. Cummings, 70 Maine, 125	246	Cambridge v. Fifield, 126 Mass. 428	75
Booraem v. Crane, 103 Mass. 522	111	Campbell v. Dearborn, 109 Mass. 130	13
Borden v. Sackett, 113 Mass. 214	211	Camp's appeal, 36 Conn. 88	432
Borneman v. Sidlinger, 15 Maine, 429	431	Canal Co. v. Clark, 13 Wall. 311	326
Boston v. Moore, 3 Allen, 126	144	Canedy v. Marcy, 13 Gray, 373	234
Boston Ice Co. v. Potter, 123 Mass. 23	386	Cape v. Crowell, 66 Maine, 282	95
Boston Relief & Submarine Co. v. Burnett, 1 Allen, 410	188	— v. Doty, 13 Allen, 262	214
Boulting v. Boulting, 3 Sw. & Tr. 329	19	Carleton v. Franconia Iron & Steel Co. 99 Mass. 216	371
Bowditch v. Banuelos, 1 Gray, 220	343	Carlton v. Jackson, 121 Mass. 592	351
Boyes v. Bedale, 1 Hem. & Mil. 798	257	Carney v. Shanly, 107 Mass. 568	338
Boynton v. Kellogg, 3 Mass. 189	150	Carpenter v. Coit, 1 D. Chip. 88	238
Bradford v. Stevens, 10 Gray, 379	300	— v. Pennsylvania, 17 How. 456	566
— v. Tappan, 11 Pick. 76	315	— v. Turrell, 100 Mass. 450	64
Bradley v. Boston & Maine Railroad, 2 Cush. 539	365	Carron Iron Co. v. MacLaren, 5 H. L. Cas. 416	148
Bradstreet v. Butterfield, 129 Mass. 339	565	Carter v. Carter, 5 Bing. 406	291
Braman v. Dowse, 12 Cush. 227	184	— v. ——— 2 Moore & Payne, 732	291
Brannon v. Hursell, 112 Mass. 63	86, 434	— v. Thurston, 58 N. H. 104	588
Brenner v. Duard, 126 Mass. 400	63	Cayzer v. Taylor, 10 Gray, 274	276
Breslau v. Brown, 3 App. Cas. 672	522	Cecil v. Hicks, 29 Gratt. 1	91
Brewster v. Wakefield, 22 How. 118	92	Chace v. Trafford, 116 Mass. 529	51
Brigham v. Aldrich, 105 Mass. 212	188	Chapin v. Waters, 110 Mass. 195	460
— v. Wheeler, 12 Allen, 89	296	Chapman v. Foster, 6 Allen, 136	412
Brown v. Jackson, 3 Wheat. 449	217	Charles v. Taylor, 3 C. P. D. 492	273
— v. Lapham, 3 Cush. 551	350	Charles River Bridge v. Warren Bridge, 11 Pet. 420	180, 566
— v. Lunt, 37 Maine, 423	565	Chase v. Chase, 6 Gray, 157	18
— v. Simons, 44 N. H. 475	309	— v. Redding, 13 Gray, 418	430
— v. Tyler, 8 Gray, 135	549	Cheatham v. Ward, 1 B. & P. 630	466
Bryant v. Rich, 106 Mass. 180	508	Chelmsford Co. v. Demarest, 7 Gray, 1	75
Budd v. Hiler, 3 Dutch. 43	517	Chesterfield Manuf. Co. v. Dehon, 5 Pick. 7	303
Bullock v. Bullock, 122 Mass. 3	248	Chichester v. Donegal, 1 Addams, 5	18
Bump v. Phoenix, 6 Hill, 308	50	Chickering v. Lovejoy, 13 Mass. 51	211
Burgess v. Equitable Ins. Co. 126 Mass. 70	187	Choate v. Arrington, 116 Mass. 552	230, 460
— v. Keyes, 108 Mass. 48	461	Clapp v. Ingraham, 126 Mass. 200	455
— v. Southbridge Savings Bank, 2 Fed. Rep. 500	91	Clark v. Baker, 5 Met. 452	302
Burghardt v. Turner, 12 Pick. 534	554	— v. Brown, 14 Mass. 271	450
		— v. Clark, 8 Cush. 385	248
		— v. Grahm, 6 Wheat. 577	245

Clark v. Munroe, 14 Mass. 351	211	Commonwealth v. Walton, 11 Allen,	497
— v. Parker, 4 Cush. 361	337	238	
Clarke v. Hayes, 9 Gray, 426	564	— v. Whitney, 108 Mass. 5	497
— v. Minot, 4 Met. 346	592	— v. Wolcott, 110 Mass. 67	497
Clay v. Brigham, 8 Gray, 161	366	— v. Woods, 10 Gray, 477	125
Clough v. Clough, 117 Mass. 83	434	Comstock v. Farnum, 2 Mass. 96	450
Clouston v. Shearer, 99 Mass. 209	379	— v. Smith, 13 Pick. 116	216
Cochran v. Guild, 106 Mass. 29	290	Conant v. Newton, 126 Mass. 105	516
Coe v. Persons Unknown, 43 Maine,	218	Connecticut v. Jackson, 1 Johns.	
432		Ch. 13	92
Coggeshall v. Potter, 1 Holmes C. C.	283	Connecticut River Railroad v. County	
75		Commissioners, 127 Mass. 50	135
Colburn v. Swett, 1 Met. 232	578	Conrad v. Massasoit Ins. Co. 4 Allen,	349
Collingill v. Haverhill, 128 Mass. 218	595	20	309
Collins v. Douglass, 1 Gray, 167	452	Cook v. Basley, 123 Mass. 396	309
Colton v. Richards, 123 Mass. 484	274	— v. Farrington, 10 Gray, 70	234
Combs v. Scott, 12 Allen, 493	558	— v. Fowler, L. R. 7 H. L. 27	88
Commonwealth v. Adams, 7 Gray,	114	— v. Lansing, 3 McLean, 571	335
43		Cooke, In re, 11 Bankr. Reg. 1	12
— v. Boston & Lowell Railroad,	320	— v. Ford, 16 Am. Law Reg.	
126 Mass. 61		(N. S.) 417	512
— v. Boston & Worcester Rail-	366	Coombe, petitioner, 127 Mass. 278	471
road, 101 Mass. 201		— v. New Bedford Cordage Co.	
— v. Bowen, 13 Mass. 356	492	102 Mass. 572	276
— v. Boyle, 14 Gray, 3	480	Cooper v. Robinson, 2 Cush. 184	565
— v. Buttrick, 100 Mass. 12	126	Corcoran v. Doll, 32 Cal. 82	91
— v. Byrnes, 126 Mass. 248	537	Corlies v. Cumming, 6 Cowen, 181	303
— v. Cambridge, 4 Met. 35	300	Cornwell v. Thurston, 59 Miss. 166	234
— v. Caryl, 105 Mass. 582	122	Cox v. Cooper, 3 Ala. 256	238
— v. Carpenter, 3 Mass. 268	136	Craig v. New York, New Haven &	
— v. Casey, 12 Allen, 214	508	Hartford Railroad, 118 Mass. 431	320
— v. Clark, 14 Gray, 367	235	Crapo v. Stetson, 8 Met. 393	290
— v. Coffee, 9 Gray, 139	111	Cromie, In re, 2 Biss. 160	506
— v. Cohen, 120 Mass. 198	493	Cromwell v. County of Sac, 96 U. S.	
— v. Davis, 11 Pick. 432	493	51	94
— v. Desmarteau, 16 Gray, 1	493	Cronan v. Cotting, 104 Mass. 245	63
— v. Dowdican's Bail, 115 Mass.	538	Crosby v. Montgomery, 38 Vt. 238	234
133		Crowley v. Commonwealth, 11 Met.	
— v. Fitchburg Railroad, 126	444	575	114
Mass. 472		Culver v. Benedict, 13 Gray, 7	360
— v. Fitzgerald, 2 Allen, 297	487	Cummings v. Bramhall, 120 Mass.	
— v. Glover, 111 Mass. 395	493	552	197
— v. Gould, 118 Mass. 300	460	— v. Fullam, 13 Vt. 434	238
— v. Harris, 8 Gray, 470	480	Cutter v. Davenport, 1 Pick. 81	245
— v. Hatfield, 107 Mass. 227	122	Daley v. Carney, 117 Mass. 288	386
— v. Hills, 10 Cush. 530	115	Dalhousie v. McDouall, 7 Cl. & Fin.	
— v. Hunt, 4 Pick. 252	493	817	251
— v. Intoxicating Liquors, 105	537	— v. — 1 Robinson H. L.	
Mass. 468		475	251
— v. Johns, 6 Gray, 274	122	Dalrymple v. Dalrymple, 2 Hagg.	
— v. Kendall, 113 Mass. 210	476	Consist. 54	246
— v. Knapp, 10 Pick. 477	492	Dana v. Carr, 124 Mass. 897	452
— v. Lane, 113 Mass. 458	248	Danforth v. Penny, 3 Met. 564	446
— v. Lockwood, 109 Mass. 323	498	Danzell v. Webquish, 108 Mass. 133	471
— v. Macloon, 101 Mass. 1	497	Davis v. Bean, 114 Mass. 353	290
— v. McLaughlin, 122 Mass. 449	122	— v. — 114 Mass. 360	309
— v. Morrell, 99 Mass. 542	475	— v. Boston, 129 Mass. 377	566
— v. Mullins, 2 Allen, 295	475	— v. Ney, 125 Mass. 590	430
— v. Nancrede, 32 Penn. St. 389	264	— v. Travis, 98 Mass. 222	188, 597
— v. Parker, 2 Pick. 549	473	Davison v. Johnnot, 7 Met. 388	564
— v. Randall, 4 Gray, 36	493	Dearborn v. Ames, 8 Gray, 1	133
— v. Rourke, 10 Cush. 397	111	Dedham Bank v. Chickering, 3 Pick.	
— v. Rowe, 105 Mass. 590	123	335	75
— v. Sanborn, 14 Gray, 393	493	De la Chaumette v. Bank of Eng-	
— v. Smith, 111 Mass. 429	104	land, 2 B. & Ad. 385	58
— v. Tuckerman, 10 Gray, 173	110		

Demmon v. Green, 5 Dane Ab. 206	527	Fales v. Russell, 16 Pick. 315	56
Denny v. Mattoon, 2 Allen, 361	563	Fall River Iron Works v. Croade, 15	
Devaynes v. Robinson, 24 Beav. 86	288	Pick. 11	315
Dial v. Reynolds, 96 U. S. 340	507	Farnsworth v. Boston, 126 Mass. 1	96
Dickinson v. Central National Bank,		— v. Terre Haute, Alton & St.	
129 Mass. 279	437	Louis Railroad, 29 Miss. 75	448
— v. Conway, 12 Allen, 487	568	Farrington v. Kimball, 126 Mass. 313	291
Diggs v. Wolcott, 4 Cranch, 179	507	Farris v. Richardson, 6 Allen, 118	133
Doe v. Childress, 21 Wall. 642	13	Farwell v. Boston & Worcester Rail-	
— v. Vardill, 7 Cl. & Fin. 895	245	road, 4 Met. 49	271
— v. — 2 Cl. & Fin. 571	247	— v. Raddin, 139 Mass. 7	523
— v. — 9 Bligh N. R. 32	247	Fashnacht v. Frank, 23 Wall. 416	509
— v. — 5 B. & C. 438	252	Favor v. Boston & Lowell Railroad,	
— v. — 8 D. & R. 185	252	114 Mass. 360	335
— v. — 6 Bing. N. C. 385	252	Fay v. Valentine, 12 Pick. 40	333
— v. — 1 Scott N. R. 828	252	Fayerweather v. Dickinson, 2 Allen,	
— v. — West H. L. 500	252	385 n.	563
— v. Warren, 7 Greenl. 48	92	Feital v. Middlesex Railroad, 109	
Dolan v. Trelevan, 31 Wis. 147	234	Mass. 398	321
Donaldson v. Farwell, 93 U. S. 631	283	Feltham v. England, L. R. 2 Q. B. 33	273
Donegal v. Donegal, 3 Phillim. 597	18	Fenton v. Livingstone, 3 Macq. 497	255
Donnell v. The Starlight, 103 Mass.		Ferry v. Ferry, 2 Cush. 92	92
227	573	Fessard v. Mugnier, 18 C. B. (N. S.)	
Don's estate, 4 Drewry, 194	255	286	6
Dorchester v. Webb, Cro. Car. 372	466	Firmin v. Pulham, 2 DeG. & Sm. 99	49
— v. — W. Jones, 345	466	Fisher v. Essex Bank, 5 Gray, 373	
Downs v. Fuller, 2 Met. 135	459		231, 437
Drinan v. Nichols, 115 Mass. 353	403	Fiske v. Chamberlin, 103 Mass. 495	212
Drury v. Natick, 10 Allen, 169	343	— v. Tolman, 124 Mass. 254	350, 557
— v. Vannevar, 5 Cush. 442	336	Fitzgerald v. Salentine, 10 Met. 436	30
Duffee v. Buchanan, 8 Ala. 27	462	Flagg v. Mann, 14 Pick. 467	332
Duffield v. Elwes, 1 Bligh N. R. 497	430	Flint v. Gibson, 106 Mass. 391	146
— v. Hicks, 1 Dow. & Cl. 1	430	Florence Sewing Machine Co. v.	
Duffy v. Upton, 113 Mass. 544	274	Grover & Baker Co. 110 Mass. 70	506
Dugan v. Nichols, 125 Mass. 43	283	— v. — 1 Holmes C. C. 235	508
Dunklee v. Greenfield Steam Mill		— v. — 18 Wall. 553	508
Co. 3 Foster, 245	238	Florentine v. Barton, 2 Wall. 210	566
Dunn v. Sargent, 101 Mass. 336	564	Flynt v. Arnold, 2 Met. 619	212
Duran v. Ayer, 67 Maine, 145	93	Follett v. Buyer, 4 Ohio St. 586	233
Durgin v. Munson, 9 Allen, 396	274	Forbush v. Lombard, 13 Met. 109	234
Du Vivier v. Hopkins, 116 Mass. 125	508	Ford v. Fitchburg Railroad, 110	
Dwight v. Ludlow Manuf. Co. 128		Mass. 240	273
Mass. 280	40	— v. Stuart, 19 Johns. 342	430
— v. Whitney, 15 Pick. 179	303	Forsyth v. Hooper, 11 Allen, 419	557
Earle v. Fiske, 103 Mass. 491	212	Foss v. Lowell Five Cents Savings	
Eastern Railroad v. Relief Ins. Co.		Bank, 111 Mass. 285	430
98 Mass. 420	186	— v. Nutting, 14 Gray, 484	335
Eastman v. Foster, 8 Met. 19	134	Foster v. Ames, 1 Lowell, 313	12
Eaton v. Boissonnault, 67 Maine, 540	93	— v. Essex Bank, 16 Mass. 245	564
Edson v. Munsell, 10 Allen, 557	473	— v. Goulding, 9 Gray, 50	134
Edwards v. Coombe, L. R. 7 C. P.		— v. Mackay, 7 Met. 531	475
519	6	— v. Peyser, 9 Cush. 242	35
— v. Mitchell, 1 Gray, 239	314	— v. Ropes, 111 Mass. 10	366
Elliott v. Pray, 10 Allen, 378	36	— v. Waterman, 124 Mass. 592	265
Embree v. Hanna, 5 Johns. 101	450	— v. Wylie, 60 Maine, 109	337
Emery v. Hildreth, 2 Gray, 223	516	Fox v. Harding, 7 Cush. 513	324
Emerson v. Patch, 123 Mass. 541	301	— v. Union Sugar Refinery, 109	
Estabrook v. Earle, 97 Mass. 302	412	Mass. 292	356
Esty v. Currier, 98 Mass. 500	32	Freakley v. Fox, 9 B. & C. 130	462
Etnyre v. McDaniel, 28 Ill. 201	91	Freeland v. Hastings, 10 Allen, 570	563
Evans v. Clapp, 123 Mass. 165	39	Freeman's National Bank v. Savery,	
Exall v. Partridge, 8 T. R. 308	291	127 Mass. 75	553
Fair v. Manhattan Ins. Co. 112 Mass.		French v. Hay, 22 Wall. 250	507
390	301	Fryer v. Gildridge, Hob. 10	461
		Fuller v. Percival, 126 Mass. 381	333
		Fuselier v. Masse, 4 La. 423	293

Gahagan v. Boston & Lowell Railroad, 1 Allen, 187	352	Guilford v. Supervisors of Chenango, 3 Kernan, 143	566
Gale v. Coburn, 18 Pick. 397	233	Gurney v. Howe, 9 Gray, 404	473
Gallagher v. Piper, 16 C. B. (N. S.) 689	273	Guy v. Franklin, 5 Cal. 416	91
Gallup v. Robinson, 11 Gray, 20	592	Hackett v. Buck, 123 Mass. 369	214
Galpin v. Critchlow, 112 Mass. 339	508	Hafford v. New Bedford, 16 Gray, 297	578
Gardner v. Gardner, 3 Mason, 178	156	Haines v. Carpenter, 91 U. S. 254	507
Garland v. Salem Bank, 9 Mass. 408	69	Haldenby v. Spofforth, 1 Beav. 390	288
Garstin v. Garstin, 4 Sw. & Tr. 73	18	Hale v. Huse, 10 Gray, 99	291
Gavett v. Manchester & Lawrence Railroad, 16 Gray, 501	501	Hall v. Bliss, 118 Mass. 554	291, 308, 379
Gay v. Cambridge, 123 Mass. 387	526	— v. Crocker, 3 Met. 245	214
— v. Kingsley, 11 Allen, 845	338	— v. Hall, 123 Mass. 120	166
Gibbins v. Shepard, 125 Mass. 541	267	— v. Johnson, 3 H. & C. 589	274
Gilbert v. Hebard, 8 Met. 129	136	— v. Marsh, 11 Allen, 563	134
Gile v. Stevens, 13 Gray, 146	296	— v. Pratt, 5 Ohio, 72	467
Gillott v. Eaterbrook, 48 N. Y. 374	327	— v. Ripley, 119 Mass. 185	311
Gillshannon v. Stony Brook Railroad, 10 Cush. 228	272	Hamilton v. Boston Port Society, 126 Mass. 407	301
Gilman v. Eastern Railroad, 10 Allen, 233	272	— v. Cunningham, 2 Brock. 350	303
— v. — 13 Allen, 433	272	— v. Van Rensselaer, 43 N. Y. 244	91
— v. Hunnewell, 122 Mass. 139	326	Hamlin, Ex parte, 2 Lowell, 571	8
Gipps v. Gipps, 3 Sw. & Tr. 116	19	Hampshire & Hampden Canal Co. v. Ashley, 15 Pick. 496	136
— v. — 11 H. L. Cas. 1	19	Hand v. Armstrong, 18 Iowa, 324	91
Glen & Hall Manuf. Co. v. Hall, 61 N. Y. 226	327	Hanover Bank v. Smith, 13 Blatchf. C. C. 224	512
Goddard v. Perkins, 9 Gray, 411	538	Hapgood v. Batcheller, 4 Met. 573	303
— v. Sawyer, 9 Allen, 78	245	Hardman v. Booth, 1 H. & C. 803	386
Goff v. Byby, Cro. Eliz. 540	493	Harkins v. Standard Sugar Refinery, 122 Mass. 400	274
Gold v. Eddy, 1 Mass. 1	60	Harlow v. Tufts, 4 Cush. 448	134
— v. Housatonic Railroad, 1 Gray, 424	446	Harriman v. Harriman, 12 Gray, 341	21
Goldrick v. Bristol County Savings Bank, 123 Mass. 320	432	Harris v. Clark, 3 Comst. 93	431
Goodenow v. Tyler, 7 Mass. 36	303	Harrison v. Swift, 13 Allen, 144	160
Goodman v. Eastman, 4 N. H. 455	597	Hart v. Anthony, 15 Pick. 445	446
— v. Goodman, 3 Giff. 643	257	— v. Henderson, 17 Mich. 218	566
Goodman's trusts, 14 Ch. D. 619	257	Harvard College v. Boston, 104 Mass. 470	552
Goodrich v. Bodurtha, 6 Gray, 323	600	Harvey v. Ball, 32 Ind. 98	261
Goose's case, Moore, 461	498	— v. Farnie, 5 P. D. 153	249
Gordillo v. Weguelin, 5 Ch. D. 237	90	Haskell, In re, 11 Bankr. Reg. 164	5
Gordon v. Green, 113 Mass. 259	508	Hatton, In re, L. R. 7 Ch. 723	5
Gorham v. Gross, 125 Mass. 232	320	Haven v. Grand Junction Railroad, 109 Mass. 88	177
Gorham Co. v. White, 14 Wall. 511	323	Hayden v. Androscoggin Mills, 1 Fed. Rep. 93	448
Gould v. Boston Duck Co. 13 Gray, 442	296	Haynes v. Jones, 5 Met. 392	211
Grafton Bank v. Bickford, 13 Gray, 564	563	— v. Rutter, 24 Pick. 242	313
Granite Bank v. Ayers, 16 Pick. 392	69	Hazard v. Mare, 6 H. & N. 434	5
Grant v. Willey, 101 Mass. 356	150	Hazelton v. Valentine, 113 Mass. 472	490
Gray v. Briscoe, 6 Cush. 687	96	Hazleton v. Lesure, 9 Allen, 24	211
Green v. Commonwealth, 111 Mass. 417	497	Heartt v. Rhodes, 66 Ill. 351	91
Greene v. Borland, 4 Met. 330	342	Hemmingway, Ex parte, 26 L. T. (N. S.) 296	5
— v. Darling, 5 Mason, 201	238	Henry v. Barrett, 6 Allen, 500	156
Greenfield Savings Bank v. Stowell, 123 Mass. 196	597	— v. Thomas, 119 Mass. 683	415
Greenwood v. Curtis, 6 Mass. 358	248	Herman, In re, 17 Bankr. Reg. 440	8
Grim v. Weissenberg School District, 57 Penn. Ct. 438	566	Herndon v. Howard, 9 Wall. 664	334
Grosvenor v. United Society of Believers, 118 Mass. 78	71	Hersey v. Jones, 123 Mass. 473	8
Grover v. Grover, 24 Pick. 261	490	Hewes v. Rand, 129 Mass. 519	525 n.
Guild v. Butler, 122 Mass. 498	5	Heywood v. Perrin, 10 Pick. 228	392
		— v. Stiles, 124 Mass. 275	557

Hickey v. Boston & Lowell Railroad, 14 Allen, 429	352, 502	Ipswich Manuf. Co. v. Story, 5 Met. 810	460
Hicks v. Chapman, 10 Allen, 463	461	Jackson v. Jackson, 1 Johns. 424	18
Higbee v. Bacon, 11 Pick. 423	537	Jefferson Branch Bank v. Skelly, 1 Black, 436	180
Hildreth v. Brigham, 12 Allen, 71	157	Jenkins v. Brewster, 14 Mass. 291	236
Hill v. Bacon, 110 Mass. 387	290	Jennings v. Chase, 10 Allen, 526	21
— v. Bartlett, 124 Mass. 399	452	— v. Commonwealth, 105 Mass. 586	114
— v. Boston, 122 Mass. 344	594	Jewett v. Draper, 6 Allen, 434	184
— v. Crompton, 119 Mass. 376	188	Johnson v. Boardman, 6 Allen, 28	82
— v. Keyes, 10 Allen, 258	133	— v. Boston & Maine Railroad, 125 Mass. 75	441
— v. Stevenson, 63 Maine, 364	432	Jones v. Dexter, 125 Mass. 469	337
Hilton v. Merrill, 106 Mass. 528	573	— v. Geroch, 6 Jones Eq. 190	247
Hinckley v. Cape Cod Railroad, 120 Mass. 257	320	— v. Wolcott, 15 Gray, 541	237
Hobart v. Stone, 10 Pick. 215	460	Justices v. Murray, 9 Wall. 274	506
Hodgkins v. Eastern Railroad, 119 Mass. 419	274	Kearney v. Taylor, 15 How. 494	565
Holbrook v. Finney, 4 Mass. 566	211	Keene v. Keene, 3 C. B. (N. S.) 144	87
Holden v. Trust Co. 100 U. S. 72	94	Keening v. Ayling, 126 Mass. 404	398
Holly v. Huggeford, 8 Pick. 73	142	Kelley v. Boston Lead Co. 128 Mass. 456	274
Holmes v. Hunt, 122 Mass. 505	301	— v. Norcross, 121 Mass. 508	274
— v. Trumper, 22 Mich. 427	597	Kenady v. Lawrence, 128 Mass. 318	526
Home National Bank v. Carpenter, 120 Mass. 1	8	Kendall v. Boston, 118 Mass. 234	321
Hood v. Adams, 124 Mass. 481	309	— v. Carland, 5 Cush. 74	600
— v. Hood, 11 Allen, 196	248	— v. May, 10 Allen, 59	475
— v. — 110 Mass. 463	248	Kenney v. Ingalls, 126 Mass. 488	283
Hooker v. Bancroft, 4 Pick. 50	462	Kerr v. Moon, 9 Wheat. 565	246
Hooper v. Hills, 2 Pick. 435	450	Ketchum v. Duncan, 96 U. S. 659	177
Hopkins v. Crittenden, 10 Tex. 189	91	Kilgore v. Powers, 5 Blackf. 22	91
Hough v. Railway Co. 100 U. S. 213	278	Kimball v. Leland, 110 Mass. 325	430
— v. Western Transportation Co. 1 Bias. 425	506	— v. Morris, 2 Met. 573	135
Houghton v. Houghton, 37 Maine, 72	236	King v. Boston & Worcester Rail- road, 9 Cush. 112	272
Houston v. Fellows, 27 Vt. 634	236	King, The, v. Morris, 1 Leach (4th ed.) 109	493
Howard v. Chase, 104 Mass. 249	400	Kingman v. Perkins, 105 Mass. 111	430
Howell v. Knickerbocker Ins. Co. 44 N. Y. 276	242	Kinney v. Allen, 1 Hughes, 106	327
Howells v. Landore Steel Co. L. R. 10 Q. B. 62	278	— v. Ensign, 18 Pick. 232	463
Howland v. Howland, 100 Mass. 222	77	Kinnier v. Kinnier, 45 N. Y. 535	18
Hoyt v. Mutual Benefit Ins. Co. 96 Mass. 539	241	Kirrigan v. Kirrigan, 2 McCarter, 146	19
Hubbard v. Callahan, 42 Conn. 524	91	Kitchen v. Mobile Bank, 14 Ala. 233	92
— v. Garfield, 102 Mass. 72	379	Knox v. Exchange Bank, 12 Wall. 379	335
Huddleston v. Lowell Machine Shop, 106 Mass. 282	276	Kohler v. Smith, 2 Cal. 597	91
Hull v. Blake, 13 Mass. 153	450	Ladd v. New Bedford Railroad, 119 Mass. 412	277
Hunt v. Rousmanier, 8 Wheat. 174	283	Lafayette Ins. Co. v. French, 18 How. 404	446
Huntington v. Knox, 7 Cush. 371	305	Lamar v. Scott, 3 Strob. 562	247
Huntress v. Burbank, 111 Mass. 213	324	Lambertson v. Hogan, 2 Penn. St. 22	563
Hurd v. Curtis, 7 Met. 94	233	Lancaster v. Choate, 5 Allen, 530	184
Hussey v. Smith, 99 U. S. 20	565	Lane v. Atlantic Works, 111 Mass. 136	311
Hutchinson v. Boston Gas Light Co. 122 Mass. 219	321	Lang, Ex parte, 5 Ch. D. 971	522
— v. Concord, 41 Vt. 271	535	Langmaid v. Puffer, 7 Gray, 378	30
— v. York, Newcastle & Ber- wick Railway, 5 Exch. 343	273	Langton v. South Carolina Rail- road, 2 So. Car. (N. S.) 248	93
Hyde v. Hyde, L. R. 1 P. & D. 130	247	Larkin v. Boston, 128 Mass. 521	526
Iderton v. Iderton, 2 H. Bl. 145	247	— v. Wilson, 106 Mass. 120	446
Ingis v. Sailor's Snug Harbor, 3 Pet. 99	286	Larue v. Farren Hotel Co. 116 Mass. 67	371
Inman v. Mead, 97 Mass. 310	459		
Insurance Co. v. Dunn, 19 Wall. 214	508		

<i>Lash v. Lambert</i> , 15 Minn. 416	98	<i>Mahurin v. Bickford</i> , 6 N. H. 567	601
<i>Lassence v. Tierney</i> , 1 Macn. & Gord. 551	197	<i>Manuf. Co. v. Trainer</i> , 101 U. S. 51	326
<i>Lawrence v. Ballou</i> , 50 Cal. 258	448	<i>March v. Eastern Railroad</i> , 40 N. H. 548	448
— <i>v. Boston</i> , 119 Mass. 126	349	<i>Marcy v. Marcy</i> , 6 Met. 360	510
— <i>v. Stonington Bank</i> , 6 Conn. 521	360	<i>Marietta Iron Works v. Lottimer</i> , 25 Ohio St. 621	91
<i>Laycock v. Pickles</i> , 4 B. & S. 497	51	<i>Markey v. Mutual Benefit Ins. Co.</i> 103 Mass. 78	241
<i>Leavitt v. Fletcher</i> , 10 Allen, 119	35	<i>Marsh v. McKenzie</i> , 99 Mass. 64	133
<i>LeBarron v. East Boston Ferry Co.</i> 11 Allen, 812	321	<i>Marshall v. Fisk</i> , 6 Mass. 24	212
<i>Lee v. Kane</i> , 6 Gray, 495	366	<i>Martin v. Kunzmüller</i> , 37 N. Y. 396	237
<i>Leggett v. Hunter</i> , 19 N. Y. 445	564	<i>Martineau v. Kitching</i> , L. R. 7 Q. B. 436	318
<i>Leigh v. Arnold</i> , 5 Cush. 615	133	<i>Mattingly v. District of Columbia</i> , 97 U. S. 687	566
<i>Leland v. Felton</i> , 1 Allen, 531	460	<i>Mattoon v. Cowing</i> , 13 Gray, 387 77,	460
<i>Lerner v. Johns</i> , 9 Allen, 419	302	<i>May v. King</i> , 12 Mod. 537	51
<i>Levy v. Franklin Savings Bank</i> , 117 Mass. 448	432	— <i>v. —</i> 1 Id. Raym. 680	51
<i>Lewis v. Leonard</i> , 5 Ex. D. 165	8	— <i>v. Wannemacher</i> , 111 Mass. 202	314
<i>Libbey v. Hodgdon</i> , 9 N. H. 394	448	<i>Mayhew v. Gay Head</i> , 13 Allen, 129	471
<i>Light v. Goddard</i> , 11 Allen, 5	169	<i>Mayo v. Boston & Maine Railroad</i> , 104 Mass. 137	319, 373
<i>Lincoln v. Lincoln</i> , 12 Gray, 45	188, 597	<i>Medway v. Needham</i> , 16 Mass. 157	248
— <i>v. Parsons</i> , 1 Allen, 388	538	<i>Meesel v. Lynn & Boston Railroad</i> , 8 Allen, 234	353
<i>Linfield v. Old Colony Railroad</i> , 10 Cush. 562	365	<i>Melhado v. Watson</i> , 2 C. P. D. 281	523
<i>Lingen v. Lingen</i> , 45 Ala. 410	261	<i>Merchants' National Bank v. National Eagle Bank</i> , 101 Mass. 281	439
<i>Linzee v. Mixer</i> , 101 Mass. 512	397	<i>Merriam v. Boston, Clinton & Fitchburg Railroad</i> , 117 Mass. 241	472
<i>Live Stock Association v. Crescent City Co.</i> 1 Abbott U. S. 388	507	<i>Meserve v. Meserve</i> , 19 N. H. 240	234
— <i>v. —</i> 1 Woods, 21	507	<i>Metcalf v. Framingham Parish</i> , 128 Mass. 370	197
<i>Locke v. Dane</i> , 9 Mass. 360	563	<i>Metzler v. Wood</i> , 8 Ch. D. 606	328
— <i>v. Lewis</i> , 124 Mass. 1	305, 360	<i>Meyer v. Construction Co.</i> 100 U. S. 457	510
<i>Lockier v. Smith</i> , 1 Keb. 313	465	<i>Milford v. Holbrook</i> , 9 Allen, 17	35
— <i>v. —</i> Sid. 79	465	<i>Milkman v. Ordway</i> , 106 Mass. 232	407
<i>Loring v. Kendall</i> , 1 Gray, 305	77	<i>Miller v. Burroughs & Johns</i> . Ch. 436	91, 434
— <i>v. Sumner</i> , 23 Pick. 98	197	— <i>v. Miller</i> , 16 Mass. 59	564
— <i>v. Thorndike</i> , 5 Allen, 257	259	— <i>v. Race</i> , 1 Burr. 452	58
<i>Lovell v. Howell</i> , 1 C. P. D. 161	273	<i>Milliken v. Pratt</i> , 125 Mass. 374	246
<i>Loving v. Worthington</i> , 106 Mass. 86	99	<i>Mitchell v. Lapage</i> , Holt N. P. 253	386
<i>Lowe v. Peskett</i> , 16 C. B. 500	467	— <i>v. Pease</i> , 7 Cush. 360	433
<i>Lowell, appellant</i> , 22 Pick. 215	343	<i>Mix v. Hotchkiss</i> , 14 Conn. 82	309
— <i>v. Daniels</i> , 2 Gray, 161	472	<i>Monnett v. Sturges</i> , 25 Ohio St. 384	91
<i>Ludwick v. Huntzinger</i> , 5 W. & S. 51	92	<i>Monson v. Palmer</i> , 8 Allen, 551	259
<i>Lumb v. Jenkins</i> , 100 Mass. 527	259	<i>Montague v. Boston & Albany Railroad</i> , 124 Mass. 242	549
<i>Lund v. Tyngsboro</i> , 11 Cush. 663	311	— <i>v. Dawes</i> , 14 Allen, 369	403
— <i>v. Tyngsborough</i> , 9 Cush. 36	313	<i>Montgomery v. Pickering</i> , 116 Mass. 227	436
<i>Lyster v. Lyster</i> , 111 Mass. 327	19	<i>Moody v. Newburyport</i> , 3 Met. 431	579
<i>McCabe v. Swap</i> , 14 Allen, 188	404	<i>Moreland v. Lawrence</i> , 23 Minn. 84	93
<i>Macomber v. Dunham</i> , 8 Wend. 550	91	<i>Morgan v. Jones</i> , 8 Exch. 620	87
<i>McCormick v. Sullivan</i> , 10 Wheat. 192	246	— <i>v. Moore</i> , 3 Gray, 319	356
<i>McCracken v. San Francisco</i> , 16 Cal. 591	241	— <i>v. Vale of Neath Railway</i> , 5 B. & S. 570	271
<i>McGrath v. Clark</i> , 56 N. Y. 34	597	— <i>v. —</i> L. R. 1 Q. B. 149	271
<i>McGregor v. Wait</i> , 10 Gray, 72	472	<i>Morse v. Glendon Co.</i> 125 Mass. 232	274
<i>McLane v. Abrams</i> , 2 Nev. 199	91	<i>Morton v. Hall</i> , 118 Mass. 511	309
<i>McLean v. Fleming</i> , 96 U. S. 245	328	— <i>v. Mutual Ins. Co.</i> 105 Mass. 508	508
<i>M'Mechan v. Griffing</i> , 9 Pick. 537	212		
<i>McMurdy v. Connecticut Ins. Co.</i> 9 Chicago Legal News, 324	512		
<i>McSorley v. Larissa</i> , 100 Mass. 270	383		
<i>Mahone v. Manchester & Lawrence Railroad</i> , 111 Mass. 72	508		

Mosler v. Potter, 121 Mass. 80	188	Paine v. Caswell, 68 Maine, 80	95
Moulin v. Trenton Ins. Co. 4 Zabz.	448	Palmer v. Clark, 106 Mass. 373	146
222		— v. Palmer, 1 Sw. & Tr. 561	19
Moulton v. Trafton, 64 Maine, 218	234	Paret v. Ticknor, 4 Dill. 111	523
Mowry v. Bishop, 5 Paige, 98	92	Parish v. Stone, 14 Pick. 198	430
— v. Smith, 9 Allen, 67	487	Parker v. Danforth, 16 Mass. 299	450
Mudge v. Wilmot, 124 Mass. 498	5, 8	— v. Dudley, 118 Mass. 602	487
Mulry v. Mohawk Valley Ins. Co. 5		— v. Kane, 4 Allen, 346	412
Gray, 541	188	— v. Nightingale, 6 Allen, 341	397
Munn v. Worrall, 53 N. Y. 44	234	— v. Rugg, 9 Gray, 209	600
Munro v. Munro, 7 Cl. & Fin. 842	250	Parkhurst v. Cummings, 56 Maine,	
— v. — 1 Robinson H. L.		165	92
492	250	Parks v. Boston, 15 Pick. 198	65
— v. Saunders, 6 Bligh N. R.		— v. Tirrell, 8 Allen, 15	837
468	250	Patterson v. Philbrook, 9 Mass. 151	563
Murphy v. Phillips, 35 L. T. (N. S.)		Pearce v. Hennessy, 10 R. I. 223	93
477	278	Pearl v. Harris, 121 Mass. 390	39
Murray v. Patrie, 5 Blatchf. C. C.		Pechner v. Phoenix Ins. Co. 6 Lansing,	
843	506	411	509
Myers v. Davis, 22 N. Y. 489	238	— v. — 65 N. Y. 195	509
		— v. — 95 U. S. 183	510
National Mount Wollaston Bank v.		Penfield v. Thayer, 2 E. D. Smith,	
Porter, 122 Mass. 308	8	305	432
National Pemberton Bank v. Porter,		Penfold v. Bouch, 4 Hare, 271	49
125 Mass. 338	440	People v. Dawell, 25 Mich. 247	18
Nedham's case, 8 Rep. 135 a	465	— v. Norton, 5 Selden, 176	516
Newby v. Von Oppen, L. R. 7 Q. B.		Peru Co. v. Whipple Manuf. Co. 109	
293	448	Mass. 464	301
New England Hospital v. Boston,		Peterson v. Farnum, 121 Mass. 476	459
113 Mass. 518	182	Pettes v. Hawes, 18 Pick. 323	234
New Orleans v. Clark, 95 U. S. 644	566	Pettes v. Commonwealth, 126 Mass.	
Newton v. Kennerly, 31 Ark. 626	93	242	114
New York Warehouse Co. v. Loomis,		Philadelphia & Wilmington Railroad	
122 Mass. 431	508	v. Maryland, 10 How. 376	180
Nichols v. Bucknam, 117 Mass. 488	291	Phillipsburg Bank v. Lackawanna	
Norcross v. Pease, 5 Allen, 331	837	Railroad, 3 Dutch. 206	448
— v. Widgery, 2 Mass. 506	212	Phinney v. Baldwin, 16 Ill. 108	91
Norris v. Clymer, 2 Penn. St. 277	564	Piedmont & Arlington Ins. Co. v.	
North v. Butts, Dyer, 139 b	466	Ewing, 92 U. S. 377	241
Norton v. Eastern Railroad, 113		Pierce v. Chace, 108 Mass. 254	472
Mass. 366	365	— v. Gilkey, 124 Mass. 300	6, 8
— v. Simonds, 124 Mass. 19	186	— v. Jackson, 6 Mass. 242	128
Noyes v. Morrill, 103 Mass. 396	813	— v. New Bedford, 129 Mass.	
Nye v. Liscombe, 21 Pick. 263	446	534	596
		— v. Phillips, 101 Mass. 813	452
Ocean Ins. Co. v. Portsmouth Rail-		— v. Pierce, 3 Pick. 299	19
way, 3 Met. 420	450	— v. Rowe, 1 N. H. 179	92
O'Connell v. Kelly, 114 Mass. 97	309	Pike v. Brown, 7 Cush. 133	184
O'Connor v. Roberts, 120 Mass. 227	274	Piper's estate, In re, 15 Penn. St.	
— v. Hallinan, 103 Mass. 547	475	533	462
Old Colony Railroad v. Miller, 125		Pitts v. Holmes, 10 Cush. 92	337
Mass. 1	65	Polydore v. Prince, 1 Ware, 402	246
Oliver v. Colonial Gold Co. 11 Allen,		Pool v. Bridges, 4 Pick. 377	313
283	366	Porter v. Judson, 1 Gray, 175	69
Ordway v. Colcord, 14 Allen, 59	70	Potter v. Green, 6 Allen, 442	21
Osborn v. Adams, 18 Pick. 245	315	— v. Titcomb, 22 Maine, 300	247
Osgood v. Chicago, Danville & Vin-		Potts v. Port Carlisle Dock & Rail-	
cennes Railroad, 6 Biss. 330	506	way, 2 L. T. (N. S.) 288	277
Otis v. Hadley, 112 Mass. 100	335	Pratt v. Chase, 123 Mass. 262	522
Quimet v. Sirois, 124 Mass. 162	31	— v. Wheeler, 6 Gray, 520	214
Overman v. Hoboken City Bank, 1		Price v. Great Western Railway, 16	
Vroom, 61	439	M. & W. 244	87
Overton v. Bolton, 9 Heisk. 762	91	Prince v. Boston, 111 Mass. 226	552
		Pritchard v. Merchant's & Trades-	
Page v. Cooper, 16 Beav. 396	288	man's Assurance Society, 3 C. B.	
Paine v. Barnes, 100 Mass. 470	287	(N. S.) 622	242

Providence Bank v. Billings, 4 Pet. 514	180	Rodgers v. Parker, 9 Gray, 445	356
Pruyn v. Milwaukie, 18 Wis. 367	91	Ross v. Ross, 4 Wils. & Sh. 259	250
Putnam v. Collamore, 120 Mass. 454	404	Ross v. Ross, 123 Mass. 212	245
— v. Putnam, 8 Pick. 433	248	Rowe v. Williams, 97 Mass. 163	89
Queen, The, v. Crespin, 11 Q. B. 913	493	Rugg v. Parker, 7 Gray, 172	600
Railroad Co. v. Hussen, 95 U. S. 485	585	Runyan v. Mersereau, 11 Johns. 524	490
— v. McKinley, 99 U. S. 147	509	Russell v. Deahon, 124 Mass. 342	879
Randall v. Barton, 6 Met. 518	185	— v. Woodward, 10 Pick. 407	314
— v. Kreiger, 23 Wall. 187	566	Rust v. Boston Mill Corporation, 6 Pick. 158	473
Ranger v. Cary, 1 Met. 369	237	Rylands v. Fletcher, L. R. 3 H. L. 330	320
Ransome v. Bentall, 3 L. J. (N. S.) Ch. 161	327	Safford v. McDonough, 120 Mass. 290	422
Raphael v. Bank of England, 17 C. B. 161	58	Salmon v. Nation, 109 Mass. 216	452
Ray v. Underwood, 3 Pick. 302	446	Sammon v. New York & Harlem Railroad, 62 N. Y. 251	277
— v. Wight, 119 Mass. 426	13	Sampson v. Commonwealth, 5 W. & S. 385	492
Readman v. Conway, 123 Mass. 374	35	Sanchar's case, 9 Rep. 114 a	492
Reed v. Fullum, 2 Pick. 159	564	Sanford v. Hodges, 11 Gray, 485	30
— v. Northfield, 18 Pick. 94	36	— v. Sanford, 5 Day, 353	18
— v. Reed, 114 Mass. 372	436	Sargent v. Essex Marine Railway, 9 Pick. 201	232, 437
Regina v. Gaylor, 7 Cox C. C. 253	494	— v. Franklin Ins. Co. 8 Pick. 90	437
— v. — Dearsly & Bell, 288	494	— v. Southgate, 5 Pick. 312	236
— v. Hunt, 8 Car. & P. 642	111	Satterlee v. Matthewson, 2 Pet. 380	566
— v. Pembroke, Car. & M. 157	473	Sawtelle v. Rollins, 23 Maine, 196	337
— v. Vaughan, 8 Car. & P. 276	125	Sawyer, In re, 2 Lowell, 475	8
Rennell v. Kimball, 5 Allen, 856	324	— v. Coolidge, 34 Vt. 303	234
Rex v. Atkinson, 7 Car. & P. 669	125	Scanlan v. Wright, 13 Pick. 523	30
— v. Austin, 7 Car. & P. 796	115	Schafer v. Eneu, 54 Penn. St. 304	264
— v. Birkett, Russ. & Ry. 251	125	Schollenberger, Ex parte, 96 U. S. 369	448
— v. Butterworth, Russ. & Ry. 520	114	Scott, In re, 15 Bankr. Reg. 73	4, 8
— v. Campbell, 2 Leach (4th ed.) 564	108	— v. Clinton & Springfield Rail- road, 6 Bls. 529	507
— v. Carr, Russ. & Ry. 198	110	— v. Key, 11 La. Ann. 232	260
— v. Castledine, 2 East P. C. 645	104	Searle v. Lindsay, 11 C. B. (N. S.) 429	278
— v. Catesby, 2 B. & C. 814	473	Seaver v. Boston & Maine Railroad, 14 Gray, 466	272
— v. Dawson, 1 Stra. 19	125	Seavey v. Beckler, 123 Mass. 471	13
— v. Hamilton, 8 Car. & P. 49	104	Sedgwick v. Laffin, 10 Allen, 430	245
— v. Hartall, 7 Car. & P. 475	115	Selma, Rome and Dalton Railroad v. Tyson, 48 Ga. 351	448
— v. Hartley, Russ. & Ry. 139	110	Sessions v. Moseley, 4 Cush. 87	431
— v. Hoggins, Russ. & Ry. 145	110	Severy v. Nickerson, 120 Mass. 306	371
— v. Teague, 2 East P. C. 979	125	Sewall v. Roberts, 115 Mass. 262	265
— v. — Russ. & Ry. 83	125	— v. Sewall, 123 Mass. 166	18, 248
— v. Watson, 2 East P. C. 630	104	Seymour v. Continental Ins. Co. 44 Conn. 300	91
— v. — 2 Leach, 640	104	Shaw v. Gould, L. R. 3 H. L. 55	18, 255
Rhodes v. Salem Turnpike, 98 Mass. 75	448	— v. Paine, 12 Allen, 293	516
Rice v. Parkman, 16 Mass. 326	564	Shedden v. Patrick, 5 Paton, 194	249
Richards v. Holmes, 18 How. 143	96	— v. — 1 Macq. 535	250
Richardson v. Mellish, 2 Bing. 229	478	Sheedy v. Roach, 124 Mass. 472	430
— v. Palmer, 33 N. H. 212	234	Sheehan's case, 122 Mass. 445	565
Riley v. Farnsworth, 116 Mass. 228	528	Shepherd v. Chelsea, 4 Allen, 113	535
Rilling v. Thompson, 12 Bush. 810	93	Shipley v. Fifty Associates, 106 Mass. 194	820
Ritter v. Phillips, 53 N. Y. 586	91	Sigourney v. Sibley, 21 Pick. 101	516
Roberts, In re, 14 Ch. D. 49	90	— v. — 22 Pick. 507	516
— v. Bourne, 23 Maine, 165	212	— v. Wetherell, 6 Met. 553	480
Robertson v. French, 4 East, 130	323		
Robinson v. Hall, 11 Gray, 433	337		
— v. Kinney, 2 Kans. 184	93		
Roche v. Farnsworth, 106 Mass. 509	403		
Rockwood v. Walcott, 3 Allen, 453	573		

Billoway v. Columbia Ins. Co. 8 Gray, 199	447	Swick v. Sears , 1 Hill (N. Y.) 17	234
Simmons v. Hanover , 23 Pick. 188	564	Swift v. Pierce , 13 Allen, 136	82
Simonin v. Mallac , 2 Sw. & Tr. 67	246	Sykes v. Keating , 118 Mass. 517	81
Simpson v. Davis , 119 Mass. 269	597	Taft v. Morse , 4 Met. 523	166
Skottowe v. Young , L. R. 11 Eq. 474	256	Tarbell v. Parker , 101 Mass. 165	460
Smith v. Chandler , 8 Gray, 392	837	Tarrant v. Webb , 18 C. B. 797	274
— v. Derr, 34 Penn. St. 126	245	Taunton Iron Co. v. Richmond , 8 Met. 434	300
— v. Kelly, 23 Miss. 167	259	Taylor v. Columbian Ins. Co. 14 Allen, 353	315
— v. Lowe & Manuf. Co. 124 Mass. 114	274	— v. Dowlen, L. R. 4 Ch. 697	49
— v. People, 1 Parker C. C. 317	122	— v. Mixer, 11 Pick. 341	214
— v. Smith, 13 Gray, 209	19	Teal v. Sevier , 26 Tex. 516	262
Snelgrave v. Baily , 3 Atk. 214	431	Thaxter v. Grinnell , 2 Met. 13	471
Snow v. Clark , 9 Gray, 190	290	Thayer v. Middlesex Ins. Co. 10 Pick. 326	241
— v. Housatonic Railroad, 8 Allen, 441	276	— v. Wellington, 9 Allen, 233	101
Society for Propagation of Gospel v. Wheeler , 2 Gallison, 105	563	Thomas v. Poole , 7 Gray, 83	356
Sohler v. Massachusetts General Hospital , 3 Cush. 483	564	Thompson v. Moore , 2 Allen, 350	296
Solomons v. Bank of England , 13 East, 135 n.	58	— v. Pickel, 20 Iowa, 490	91
Sottomayer v. De Barros , 5 P. D. 94	246	Thomson v. Davenport , 2 Smith Lead. Cas. (5th Am. ed.) 358	151
Sparks v. Garrigues , 1 Binn. 152	92	— v. Lee County, 3 Wall. 327	566
Spaulding v. Backus , 122 Mass. 553	239	Thorpe, In re , L. R. 8 Ch. 743	8
Spencer v. Maxfield , 16 Wis. 541	91	Tillinghast v. Wheaton , 8 R. I. 536	432
Spofford v. Norton , 126 Mass. 533	440	Tingley v. Bateman , 10 Mass. 343	446
Spooner v. Holmes , 102 Mass. 503	56	Tirrell v. Bacon , 3 Fed. Rep. 62	268
Sprague v. Snow , 4 Pick. 54	233	Titcomb v. Morrill , 10 Allen, 15	26
Stanley v. Stark , 115 Mass. 259	48	Todd v. Old Colony & Fall River Railroad , 7 Allen, 207	352
State v. Floyd , 5 Strob. 58	126	Torrey v. Grant Locomotive Works , 14 Blatchf. C. C. 269	512
— v. Flye, 26 Maine, 312	126	Townsend v. Hargraves , 118 Mass. 325	186
— v. Marvels, 2 Harringt. (Del.) 527	126	Tracy v. Goodwin , 5 Allen, 409	144
— v. Maxwell, 47 Iowa, 454	126	— v. Warren, 104 Mass. 376	63
— v. Weaver, 13 Ired. 491	126	Trafton, Ex parte , 2 Lowell, 506	523
Stevens v. Gaylord , 11 Mass. 256	460	Treat v. Lord , 42 Maine, 552	586
— v. Mechanics' Savings Bank, 101 Mass. 109	335	Trinity Church v. Boston , 118 Mass. 164	180
Stevenson v. Sullivant , 5 Wheat. 207	257	Troy City Bank v. Grant, Hill & Denio , 119	439
Stewart v. Jenkins , 6 Allen, 300	412	Trull v. Howland , 10 Cush. 109	30
Stillwell v. Staples , 19 N. Y. 401	318	Tucker v. Massachusetts Central Railroad , 118 Mass. 546	349
Stockdale v. Dunlop , 6 M. & W. 224	186	Tuite v. Stevens , 98 Mass. 305	400
Stokely v. Thompson , 34 Penn. St. 210	92	Tunney v. Midland Railway , L. R. 1 C. P. 291	273
Stone v. Dennison , 13 Pick. 1	186	Turner, Ex parte , 3 Wall. Jr. 258	506
— v. Hubbard, 7 Cush. 595	336	— v. Wentworth, 119 Mass. 459	574
Strathmore Peerage case , 4. Wils. & Sh. Appx. 89	250	Udny v. Udny , L. R. 1 H. L. Sc. 441	251
— 6 Paton, 645	250	Union Institution for Savings v. Boston , 129 Mass. 82	434, 568
Strong v. Strong , 9 Cush. 500	349	Union Trust Co. v. Monticello & Port Jervis Railroad , 63 N. Y. 311	177
Stroughill v. Anstey , 1 De G., M. & G. 635	288	United States v. Crosby , 7 Cranch, 115	245
Sturley v. Albany , Cro. Eliz. 150	406	— v. McKee, 4 Dill. 1	507
Sturtevant v. Robinson , 18 Pick. 175	241	United States Bank v. Chapin , 9 Wend. 471	91
Suffield Ecclesiastical Society v. Loomis , 42 Conn. 570	91	Vail v. Durant , 7 Allen, 408	304
Swan v. Crafts , 124 Mass. 453	315	Van Benschooten v. Lawson , 6 Johns. Ch. 313	62
Swansey v. Chace , 16 Gray, 303	291		
Sweeney v. Boston Five Cents Savings Bank , 116 Mass. 334	432		
Sweeny v. Easter , 1 Wall. 166	360		
— v. Old Colony Railroad, 10 Allen, 363	36, 871		
Sweet v. Brown , 12 Met. 175	234		

Van Beuren v. Van Gaasbeck, 4 Cowen, 496	91, 434	West Roxbury v. Minot, 114 Mass. 546	83
Vannevar v. Bryant, 21 Wall. 41	509	Weybosset Bank v. Border City Mills, U. S. C. C. Rhode Island, May 1879	12
Vermilye v. Adams Express Co. 21 Wall. 138	60	Wheeler v. Guild, 20 Pick. 545	58
Vidal v. Commagère, 13 La. Ann. 516	262	Wheelock v. Freeman, 13 Pick. 165	362
Vinal v. Dorchester, 7 Gray, 421	535	Whipple v. Robbins, 97 Mass. 107	450
Virginia v. Chesapeake & Ohio Canal, 32 Md. 501	177	White v. Clapp, 8 Met. 365	516
Wade v. Withington, 1 Allen, 561	597	Whitehouse v. Continental Ins. Co. 2 Fed. Rep. 498	512
Wadsworth v. Pickles, 5 Q. B. D. 470	8	Whiting v. City Bank, 77 N. Y. 363	439
Walcott v. Swampscott, 1 Allen, 101	578	—— v. Sullivan, 7 Mass. 107	81
Walker v. Boston & Maine Railroad, 128 Mass. 8	273	Whitman v. Boston & Maine Rail- road, 3 Allen, 133	364
—— v. Moore, 125 Mass. 352	82	Whitney v. Munroe, 19 Maine, 42	450
Wall v. Provident Inst. for Savings, 3 Allen, 96	432	—— v. Union Railway, 11 Gray, 359	397
—— v. Wall, 124 Mass. 65	560	Whittaker v. West Boylston, 97 Mass. 273	36
Wallace v. Attorney General, L. R. 1 Ch. 1	256	Wight v. Shaw, 5 Cush. 56	216
—— v. M'Connell, 13 Pet. 136	450	Wightman v. Coates, 15 Mass. 1	150
Waller v. Southeastern Railway, 2 H. & C. 102	273	Wilcox v. Fairhaven Bank, 7 Allen, 270	177
Walter v. Bacon, 8 Mass. 468	563	Wildes v. Vanvoorhis, 15 Gray, 139	564
Wankford v. Wankford, 1 Salk. 299	464	Wilkinson v. Leland, 2 Pet. 627	565
Ward v. Fuller, 15 Pick. 185	364	—— v. —— 10 Pet. 294	565
—— v. Jenkins, 10 Met. 583	335	Williams, In re, 2 Bankr. Reg. 229	12
—— v. Lamson, 6 Pick. 358	315	—— v. American Bank, 4 Met. 317	601
—— v. Turner, 2 Ves. Sen. 431	431	—— v. Boardman, 9 Allen, 570	579
Waring v. Edmonds, 11 Md. 424	431	—— v. Hilton, 35 Maine, 547	309
Warner v. Juif, 38 Mich. 662	91	—— v. Hingham & Quincy Bridge & Turnpike, 4 Pick. 431	444
Warren v. Copelin, 4 Met. 594	335	—— v. Peyton, 4 Wheat. 77	561
—— v. Fitchburg Railroad, 8 Allen, 227	501	—— v. Taunton, 126 Mass. 287	136
Warrender v. Warrender, 2 Cl. & Fin. 488	246	Wilson v. Marsh, 2 Beasley, 289	91
—— v. —— 9 Bligh N. R. 89	246	—— v. Merry, L. R. 1 H. L. Sc. 326	271
—— v. —— 2 Sh. & MacI. 154	246	—— v. Morehouse, 9 Conn. 470	462
Waters v. Stickney, 12 Allen, 1	516	Wilson's trusts, L. R. 1 Eq. 247	257
Watervliet Bank v. White, 1 Denio, 608	440	Winship v. Bass, 12 Mass. 198	460
Watkins v. Holman, 16 Pet. 25	564	Witt v. Amis, 1 B. & S. 109	431
Watson v. Jones, 13 Wall. 679	507	Wood v. Goodridge, 6 Cush. 117	288
—— v. Mercer, 8 Pet. 83	566	—— v. People, 69 N. Y. 117	122
Way v. Howe, 108 Mass. 502	8	Woodward v. Towne, 127 Mass. 41	63
Webster v. Campbell, 1 Allen, 313	211	Woolley v. Groton, 2 Cush. 305	234
—— v. Cooper, 14 How. 488	563	Woolsey v. Hogan, 124 Mass. 497	8, 522
Weed v. Donovan, 114 Mass. 181	566	Wright v. Dame, 22 Pick. 55	332
Wells v. Prince, 15 Gray, 562	123	—— v. Malden & Melrose Rail- road, 4 Allen, 283	811
—— v. Tucker, 3 Binn. 366	431	—— v. Remington, 12 Vroom, 48	246
West Boylston Manuf. Co. v. Searle, 15 Pick. 225	303	—— v. Willis, 2 Allen, 191	386
West Cambridge v. Lexington, 1 Pick. 506	248	—— v. Wright, 1 Cowen, 598	431
Westerlo v. DeWitt, 36 N. Y. 340	432	Wright's trust, 2 K. & J. 595	257
Western v. Macdermott, L. R. 2 Ch. 72	397	—— 25 L. J. (N. S.) Ch. 621	257
Western Union Telegraph v. Pleas- ants, 46 Ala. 641	448	—— 2 Jur. (N. S.) 465	257
		Young, petitioner, 11 R. I. 636	234
		—— v. Thompson, 2 Kans. 83	95
		Zeigler v. Day, 123 Mass. 152	273
		Zipcey v. Thompson, 1 Gray, 243	815
		Zycklinski v. Zycklinski, 2 Sw. & Tr. 420	18

CASES
ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

HOME NATIONAL BANK *vs.* CYRUS CARPENTER & another.

Suffolk. March 13, 14, 1879. — June 24, 1880. MORTON & ENDICOTT, JJ.,
absent.

If a resolution of composition, under the U. S. St. of June 22, 1874, § 17, has been signed by the requisite majority of creditors, and the debtor's assent to its terms has been manifested by his signature to the petition by which the proceedings for a composition were initiated, and the court has adjudged that the resolution has been duly passed, and has ordered it to be recorded, its operation cannot be impeached collaterally, in an action at law, by a creditor who would otherwise be bound by it, on the ground that it was not confirmed by the signature of the debtor.

In order to give effect to a composition under the U. S. St. of June 22, 1874, § 17, it is not necessary that the debtor should make a tender to every creditor of the amount due him under the composition; but it is sufficient that such notice of his readiness to pay that amount be given to each creditor as may enable him to demand it at a reasonable place, and at the time when it is payable by the terms of the composition.

CONTRACT on a promissory note. Answer, a composition in bankruptcy under the act of Congress of June 22, 1874, § 17. Trial in the Superior Court, without a jury, before *Bacon, J.*, who allowed a bill of exceptions in substance as follows:

The defendants admitted the execution of the note, and proved the following facts: The defendants filed their petition in bankruptcy in the District Court of the United States for the District of Massachusetts, containing the usual schedule of assets and

liabilities, which included the name and address of the plaintiff and the note now sued on; but they were not adjudicated bankrupts.

The defendants signed and presented to that court a petition, representing that a composition of ten per cent in cash, to be paid within thirty days after the composition should have been accepted and confirmed by the court, with the option to the creditors to accept twelve and one half per cent, payable in three equal instalments, in four, eight and twelve months, secured by notes of the debtors, in satisfaction of all their debts, had been proposed by them to their creditors; and praying that a meeting of their creditors might be called to act upon this proposal. At a meeting called accordingly, the composition proposed was accepted by the creditors by a resolution which was passed by the requisite majority, and was reported to the court by the register, who certified that the debtors produced to the meeting statements of their assets and debts, "herewith transmitted," and that the resolution had been confirmed by the signatures, "herewith transmitted," of the debtors and of the requisite majority in number and value of the creditors. The resolution had appended to it such signatures of the creditors, but not of the plaintiff, nor of the debtors; and, in fact, no statement of assets, as referred to by the register, was filed with the papers.

The court thereupon passed the following order: "And now, on this fourth day of December, A. D. 1875, this cause came on to be heard upon the resolution for composition heretofore presented to the court; and upon hearing all persons desiring to be heard thereon, it appearing to the court that said resolution was duly passed in the manner directed by the statutes in this behalf, and the court being satisfied that said resolution is for the best interest of all concerned, it is ordered that the same be forthwith recorded, and that the statement of the debtors, as to their debts and assets, presented with the said resolution, be forthwith filed. Any person interested may apply to the court, at any time, for further directions, as provided by law, and as he may be advised."

Within two weeks after the resolution was recorded, the defendants notified the plaintiff that they were ready to pay the amount due them under the composition at their place of

business in Boston. On January 6, 1876, the defendants, not having heard from the plaintiff, sent to the plaintiff a bank check for the amount due under the first proposition of the resolution, which was returned by the plaintiff, without communication in writing or otherwise on the subject.

The defendants contended that they were discharged by the composition. The plaintiff contended that the composition was not operative, on two grounds: "First, because the defendants did not confirm the resolution for composition by their signature thereto. Second, because the defendants did not make to the plaintiff, within thirty days after the recording of the resolution, a sufficient tender of the amount due under the first clause of the composition, and never tendered the notes." The judge sustained the plaintiff's points, and thereupon found for the plaintiff; and the defendants alleged exceptions.

R. M. Morse, Jr. & H. L. Harding, for the defendants.

G. Morse, for the plaintiff.

GRAY, C. J. By the act of Congress of June 22, 1874, § 17, in any case of bankruptcy pending, whether an adjudication in bankruptcy has been had or not, the creditors of the alleged bankrupt may, at a meeting called under the direction of the court, resolve that a composition proposed by the debtor shall be accepted in satisfaction of their debts. "And such resolution shall, to be operative, have been passed by a majority in number and three fourths in value of the creditors of the debtor assembled at such meeting, either in person or by proxy, and shall be confirmed by the signatures thereto of the debtor and two thirds in number and one half in value of all the creditors of the debtor." The debtor "shall produce to the meeting a statement showing the whole of his assets and debts, and the names and addresses of the creditors to whom such debts respectively are due. Such resolution, together with the statement of the debtor as to his assets and debts, shall be presented to the court; and the court shall," upon notice to all the creditors, and upon hearing, "inquire whether such resolution has been passed in the manner directed by this section; and, if satisfied that it has been so passed, it shall, subject to the provisions hereinafter contained, and upon being satisfied that the same is for the best interest of all concerned, cause such resolution to be recorded and statement

of assets and debts to be filed; and until such record and filing shall have taken place, such resolution shall be of no validity."

"The provisions of a composition accepted by such resolution in pursuance of this section shall be binding on all the creditors whose names and addresses and the amount of the debts due to whom are shown in the statement of the debtor produced at the meeting at which the resolution shall have been passed, but shall not affect or prejudice the rights of any other creditors."

The grounds upon which it was contended by the plaintiff, and ruled by the court below, that the composition was not operative were, first, that the defendants did not confirm by their signatures the resolution for a composition; and, second, that no sufficient tender was made by the defendants to the plaintiff. We are of opinion that neither of these grounds is tenable.

It is not clear that the act of Congress requires that the resolution of composition, in order to be operative, shall be confirmed by the signatures of debtor and creditors. The words "to be operative," by strict grammatical construction, qualify only the words "shall have been passed by a majority," &c., and not the subsequent words "and shall be confirmed by the signatures," &c. But if they must be considered as applying to the signing, as well as to the passage, of the resolution of composition, they clearly relate only to something necessary to be done before the resolution is presented to the court sitting in bankruptcy for its approval, and of which that court must inquire and be satisfied in determining whether the resolution shall be recorded. *In re Scott*, 15 Bankr. Reg. 73. And where, as in this case, the resolution of composition has been signed by the requisite majority of creditors, and the debtors' assent to its terms has been manifested by their signatures to the petition by which the proceedings for a composition were initiated, and the court has adjudged that the resolution has been duly passed and has ordered it to be recorded, it is not open to a creditor, who would otherwise be bound by it, to impeach its operation collaterally by action on his original debt.

It was contended at the argument, (though the point does not appear to have been made or passed upon at the trial,) that the resolution of composition was of no validity, because no statement of assets and debts was filed. But the register certified to

the court that the debtors produced to the meeting statements of their assets and debts, "herewith transmitted;" the original petition in bankruptcy contained the usual schedule of assets and liabilities; and the order of the court, approving the resolution of composition and ordering it to be recorded, also ordered "that the statement of the debtors as to their debts and assets, presented with the said resolution, be forthwith filed." It is manifest, therefore, that the suggestion in the bill of exceptions that "in fact no statement of assets, as referred to by the register, was filed with the papers," can mean no more than that no new statement was filed by the debtors; and that the schedule contained in the original petition was treated, in accordance with a practice previously approved by the judge, as the statement required of the debtors in the proceedings for a composition. *In re Haskell*, 11 Bankr. Reg. 164.

A composition under the U. S. St. of 1874 takes effect, not from the mere contract of the parties, but from the judgment of the court in bankruptcy. *Guild v. Butler*, 122 Mass. 498. *Mudge v. Wilmot*, 124 Mass. 493. There is nothing in the terms of the statute, or in the nature of the proceeding, which requires the debtor to make a tender, in the strict sense of the word, to every creditor, of the amount due him under the composition. It would be unreasonable to require the debtor, in order to avail himself of the benefit of the composition judicially established, to seek out every creditor at his residence or place of business, perhaps in a distant state, and there make a formal tender of the amount due. It is sufficient that such notice of the debtor's readiness to pay that amount be given to each creditor as may enable him to demand it at a reasonable place, and at the time when it is payable by the terms of the composition.

This view is in accordance with the opinions expressed by English judges in cases arising under the statutes from which Congress borrowed these provisions. In *Hazard v. Mare*, 6 H. & N. 434, 444, Chief Baron Pollock, delivering the judgment of the Court of Exchequer, is reported to have said, "We incline to think that a formal tender might not be required, if a reasonable" (possibly a misprint for "seasonable") "effort to pay were made." In *Ex parte Hemmingway*, 26 L. T. (N. S.) 298, (overruled on another point only; *In re Hatton*, L. R. 7 Ch. 723, 725,)

the debtor's solicitor had written to all the creditors, stating that the debtor was ready to pay the amount due from him under the composition, or to forward the amount by post-office order, as the creditor should see fit; and the Chief Judge in Bankruptcy said: "It was the fault of the creditor alone that the debtor had not the opportunity of tendering the amount due. He could not transmit the money until he received some authority from his creditor to do so, and he certainly was not bound to follow him in order to make a physical tender of the money." In *Edwards v. Coombe*, L. R. 7 C. P. 519, 522, (upon the authority of which *In re Hatton* was decided,) Mr. Justice Willes said: "It appears from the case of *Ex parte Hemmingway* that no formal tender of the composition is necessary, but that it is enough if the debtor be ready to pay, and express his willingness to pay. That done, if the creditor declines to receive it, the debtor may set that up as an answer. The creditor cannot be allowed to avoid the effect of the resolution by any evasion on his part." And there are no opposing decisions. The cases on which the plaintiff relies only decide that, when the debtor has neither paid, nor tendered, nor offered to pay, the amount within the stipulated time, the creditor's right of action is not barred. *Fessard v. Mugnier*, 18 C. B. (N. S.) 286. *Pierce v. Gilkey*, 124 Mass. 300, and cases cited.

In the case before us, the creditors were to be paid, in thirty days after the recording of the composition, ten per cent of their debts in money, with the election of receiving instead notes of the debtors for twelve and a half per cent thereof. Within fourteen days, the debtors gave notice to the plaintiff that they were ready to pay the amount due at their own place of business in Boston, the city in which the court was held. The plaintiff never demanded payment of the money, nor gave any notice of an election to take the notes. It was the fault of the plaintiff, and not of the defendants, that the composition has not been carried out.

Exceptions sustained.

CHANDLER C. FARWELL & another vs. CHARLES E. RADDIN.

Suffolk. March 10. — June 24, 1880. ENDICOTT & SOULE, JJ., absent.

A composition in bankruptcy, under the U. S. St. of June 22, 1874, § 17, cannot be impeached collaterally in an action at law in a state court, by a single creditor who was a party to the proceedings, by showing that the composition was obtained by fraudulent acts of the bankrupt.

CONTRACT for goods sold and delivered, and on a promissory note. Answer, that the defendant filed in the District Court of the United States for the District of Massachusetts a petition to be adjudicated a bankrupt, and a petition for a meeting of his creditors to act upon a composition of his debts proposed by him; that such meeting was duly called and held, and a resolution accepting the proposed composition duly accepted by the requisite number and amount of his creditors and recorded by order of that court; that the amount of the debt due the plaintiffs, and their names and address, were duly stated in the schedule of debts annexed to the first petition, and in the statement of the defendant's debts and assets produced at the meeting of creditors; and that, after the resolution was recorded, and within the time stipulated therein, the defendant tendered and paid to the plaintiffs, and they accepted, the amount due to them under the resolution, in full settlement, discharge and composition of their claim.

At the trial in the Superior Court, the plaintiffs admitted the truth of the facts set out in the answer; but offered to prove that the defendant, before the filing of his petition in bankruptcy, abstracted from his assets the sum of about \$50,000, which he did not state in his schedule, but secreted from his creditors; that the signatures of the plaintiffs, and of nearly all the other creditors, were obtained to the composition by false and fraudulent representations made by the defendant as to the amount of his assets; and that the signatures of a portion, if not quite all, of the creditors were obtained to the composition by reason of pecuniary or other considerations paid or promised to the creditors who signed.

Putnam, J. ruled, *pro forma*, that the plaintiffs, if they proved these facts, were not entitled to maintain this action, ordered a

verdict for the defendant, and reported the case to this court, according to whose opinion on this question judgment was to be entered on the verdict or a new trial ordered.

G. H. Towle, for the plaintiffs.

R. M. Morse, Jr. & R. Stone, Jr., for the defendant.

GRAY, C. J. The U. S. St. of June 22, 1874, § 17, which defines the power of the District Court of the United States over proceedings of composition in bankruptcy, provides that, "if it shall at any time appear to the court, on notice, satisfactory evidence, and hearing, that a composition under this section cannot, in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, the court may refuse to accept and confirm such composition, or may set the same aside." Under this provision, the judgment approving the composition might have been set aside by that court for the benefit of all the creditors, upon a direct application for the purpose, and upon proof of the fraudulent acts now charged against the defendant. *In re Sawyer*, 2 Lowell, 475. *Ex parte Hamlin*, 2 Lowell, 571. *In re Scott*, 15 Bankr. Reg. 73, 90. *In re Herman*, 17 Bankr. Reg. 440. *In re Thorpe*, L. R. 8 Ch. 743, 746. Those acts cannot therefore be set up to impeach that judgment collaterally in an action at law in a state court by a single creditor who was a party to those proceedings. *Way v. Howe*, 108 Mass. 502. *Burpee v. Sparhawk*, 108 Mass. 111. *Black v. Blazo*, 117 Mass. 17. See also *Home National Bank v. Carpenter*, ante, 1; *Hersey v. Jones*, 128 Mass. 473; *Lewis v. Leonard*, 5 Ex. D. 165; *Wadsworth v. Pickles*, 5 Q. B. D. 470.

The case differs from those in which the plaintiff was not a party to, nor bound by, the adjudication in the federal court, as in *Mudge v. Wilmot*, 124 Mass. 493, and *Woolsey v. Hogan*, 124 Mass. 497; or in which the defendant had not done nor attempted to do the acts required of him by that adjudication, as in *National Mount Wollaston Bank v. Porter*, 122 Mass. 308, and *Pierce v. Gilkey*, 124 Mass. 300. *Judgment on the verdict.*

JOSEPH B. MOORS *vs.* CHARLES ALBRO.
SAME *vs.* SAME.

Suffolk. March 15. — June 24, 1880. ENDICOTT & SOULE, JJ., absent.

An attachment of property of a debtor, made within four months of the commencement of proceedings in bankruptcy, is dissolved by a conveyance by the bankrupt of his estate to trustees, under the U. S. Rev. Sta. § 5108; and, in an action by the attaching creditor to enforce his claim, in which judgment is rendered for the defendant on his discharge in bankruptcy, the trustees are entitled to judgment for their costs.

An absolute deed of land with a contemporaneous, though unrecorded, agreement of defeasance, is, in equity at least, a mortgage, as between the grantor and the grantee, leaving an equity of redemption in the former, which vests in his trustees in bankruptcy, under the U. S. Rev. Sta. § 5103; and the fact that the deed is recorded, and the agreement of defeasance is not recorded, does not create any estoppel of which an attaching creditor of the bankrupt can avail himself.

TWO ACTIONS OF CONTRACT upon promissory notes. Writs dated October 6 and October 7, 1876. Upon each writ attachments were made of real estate in Middlesex County on October 7, 1876, and of real estate in Bristol County on October 9, 1876. On February 9, 1877, the bankruptcy of the defendant was suggested. The cases were afterwards submitted to the judgment of the Superior Court upon the following statement of facts:

On August 12, 1876, the land in Bristol County was conveyed by the defendant by absolute deed, recorded September 30, 1876, to Dexter, Abbott & Co., who, at the same time and as part of the same transaction, signed and gave him the following agreement, which was never recorded: "Whereas Charles Albro of Taunton has this day conveyed to us all his right, title and interest in and to one undivided third part of certain real estate, known as the City Hotel property in said Taunton: Now these presents witness that said property has been conveyed to us, and is now held by us, as security for the repayment to the firm of Dexter, Abbott & Co. of twenty-two hundred dollars, this day advanced by said firm to said Albro, and as security for all other and further sums that may be hereafter advanced to the said Albro by the said firm, and that, when all such advances to said Albro with interest are fully repaid, said Albro will be entitled

to demand, and we will thereupon make to him, a reconveyance of the said property." On October 14, 1876, the land in Middlesex County was also conveyed by the defendant by absolute deed, recorded October 16, 1876, to Dexter, Abbott & Co., who, at the same time and as part of the same transaction, signed and gave him a similar agreement, which was never recorded. The plaintiff knew of both deeds shortly after they were recorded, but had no knowledge of the agreements until long after the institution of the proceedings in bankruptcy. The real estate attached is more than sufficient to pay the plaintiff's claims.

The petition in bankruptcy was filed February 2, and the defendant was adjudicated a bankrupt on February 5, 1877. At the first meeting of his creditors, George M. Woodward and Elisha T. Jackson were duly chosen his trustees in bankruptcy under the U. S. Rev. Sts. § 5103, and accepted the trust, and have since managed his estate under the direction of the committee of creditors chosen for that purpose; and, by order of the District Court of the United States, the following indenture was executed by the defendant and the trustees: "This indenture, made this twenty-third day of February, A. D. 1877, between Charles Albro, of said Taunton, and Elisha T. Jackson and George M. Woodward, both of said Taunton, on behalf and with the consent of the creditors of the said Charles Albro, witnesseth, that the said Charles Albro hereby conveys, transfers and delivers all his estate and effects to the said Elisha T. Jackson and George M. Woodward absolutely, to have and to hold the same in the same manner and with the same rights in all respects as the said Charles Albro would have had or held the same, if no proceedings in bankruptcy had been taken against him, to be applied and administered for the benefit of the creditors of said Charles Albro in like manner as if said Charles Albro had been at the date hereof duly adjudged bankrupt, and the said Elisha T. Jackson and George M. Woodward had been appointed assignees in bankruptcy under said act." This indenture was recorded in the proper registry of deeds for Bristol County on March 6, 1877, and in the proper registry of deeds for Middlesex County on August 8, 1877. No assignee in bankruptcy has been appointed, and the plaintiff has not proved his claims against the defendant's estate.

The trustees, not contesting the demands of the plaintiff against the estate, moved that the attachments be dissolved. The plaintiff moved for special judgments against the property attached. If the trustees were entitled to a dissolution of the attachments, judgments were to be rendered accordingly; otherwise, special judgment was to be rendered against the property attached in each case for a sum agreed on by the parties.

The Superior Court overruled the motions of the plaintiff for special judgment, and the motions of the trustees for dissolution of the attachments, and, the defendant having pleaded and proved a discharge in bankruptcy, ordered judgment for him in each action. The plaintiff and the trustees appealed to this court.

O. W. Holmes, Jr., for the plaintiff.

G. E. Williams, for the trustees in bankruptcy.

GRAY, C. J. The bankrupt act provides that where three fourths in value of the creditors whose claims have been proved have resolved that it is for the interest of the general body of the creditors that the estate of the bankrupt shall be settled by trustees under the supervision and direction of a committee of the creditors, and the resolution has been confirmed by the court, "the bankrupt, or, if an assignee has been appointed, the assignee, shall, under the direction of the court, and under oath, convey, transfer and deliver all the property and estate of the bankrupt to the trustees, who shall, upon such conveyance and transfer, have and hold the same in the same manner, and with the same powers and rights, in all respects, as the bankrupt would have had or held the same if no proceedings in bankruptcy had been taken, or as the assignee in bankruptcy would have done, had such resolution not been passed." U. S. Rev. Sts. § 5103. The conveyance to the trustees is to be made by the assignee if there is one, and by the bankrupt if no assignee has been appointed; and, whether it is made by the one or by the other, the trustees have all the powers and rights which either the bankrupt would have had if there had been no proceedings in bankruptcy, or an assignee in bankruptcy would have had if no such resolution had been passed.

It was ingeniously argued by the plaintiff's counsel, that this provision is to be construed distributively, giving the trustees

no more than the rights of the bankrupt, if the conveyance is made by the bankrupt, and the rights of an assignee, only where the conveyance is made by an assignee; and therefore that, the conveyance to the trustees in this case having been made by the bankrupt before the appointment of an assignee, the attachment made within four months of the commencement of the proceedings in bankruptcy is not dissolved by virtue of § 5044. But that argument is refuted by the subsequent clauses of § 5103, which not only declare that "the winding up and settlement of any estate under the provisions of this section shall be deemed to be proceedings in bankruptcy," but add that "the trustees shall have all the rights and powers of assignees in bankruptcy," and further provide for the examination of the bankrupt, and of any creditor or debtor of the estate, or any person known or suspected of having any of the estate in his possession, and for granting a certificate of discharge to the bankrupt, as in other proceedings in bankruptcy.

The purpose of the statute in allowing trustees to be chosen, instead of assignees, to administer the estate of the bankrupt, is to enlarge the discretionary powers of the officers entrusted by the court with the winding up and settlement of the estate. See *Foster v. Ames*, 1 Lowell, 313; *In re Cooke*, 11 Bankr. Reg. 1. The whole tenor of the section is inconsistent with the theory that, whether the bankrupt or the assignee is the person to execute the formal conveyance, the estate to be administered by the trustees shall be less than it would be if administered by an assignee in the ordinary course.

We are therefore of opinion that any attachment of property of the bankrupt, made within four months of the commencement of the proceedings in bankruptcy, is as effectually dissolved when a conveyance of the bankrupt's estate is made by the bankrupt to trustees under § 5103, as when it is made by the register to assignees in bankruptcy under § 5044. This conclusion is supported by the decisions of Judge Shipman in the District Court of the United States for the District of Connecticut in the case of *In re Williams*, 2 Bankr. Reg. 229, 230, and of Judges Lowell and Knowles in the Circuit Court of the United States for the District of Rhode Island in the case of *Weybossett Bank v. Border City Mills*, May term 1879.

The deeds from the bankrupt to Dexter, Abbott & Company of lands in Bristol and in Middlesex, with contemporaneous, though unrecorded, agreements of defeasance, were, in equity at least, mortgages, as between the bankrupt and the grantees, leaving an equity of redemption in him. *Campbell v. Dearborn*, 109 Mass. 180. That equity of redemption, like other property and rights, legal or equitable, of the bankrupt, would pass to an assignee under §§ 5044, 5046, and therefore vested in the trustees in bankruptcy. The fact that the deeds to Dexter, Abbott & Co. were recorded, while the agreements of defeasance were not recorded, does not create any estoppel of which the attaching creditors can avail themselves. The deed of the land in Bristol, having been made before the attachment, would, taken by itself, show no title whatever in the debtor which could be attached. The deed of the land in Middlesex was made after the attachment, and neither the making and recording of that deed, nor the omission to record the agreement of defeasance, constituted any representation to the attaching creditors, or anything on which they had a right to rely, or appear to have relied, to their detriment.

The result in each case is, that the plaintiff's attachment is dissolved and he is not entitled to a special judgment; that the judgment for the defendant on his discharge in bankruptcy must be affirmed; and that the trustees, who had the same right as assignees in bankruptcy to intervene to protect the estate, are to have judgment for their costs. *Doe v. Childress*, 21 Wall. 642. *Ray v. Wight*, 119 Mass. 426. *Seavey v. Beckler*, 128 Mass. 471.

Judgments accordingly.

ELIZABETH O. LOUD *vs.* EPHRAIM A. LOUD.

Suffolk. March 28, 29, 1879. — June 24, 1880. AMES & LORD, JJ., absent.

A wife who has appeared in a suit for divorce brought by her husband against her in another state, in which a decree is rendered in his favor, and who subsequently executes a release reciting the divorce therein obtained, and for a pecuniary consideration discharging all her claims against him and his estate, cannot, after his subsequent marriage and cohabitation with another woman, maintain a libel for divorce therefor against him in this state, on the ground that the court in the other state had no jurisdiction of his libel, without proving that he went to that state for the purpose of procuring a divorce.

LIBEL for divorce for adultery on and since March 18, 1878. Answer, a decree of divorce, obtained by the libellee in the Supreme Judicial Court of the State of Maine, October 4, 1877, after service of process upon and appearance of this libellant; and a release from her of all rights of dower and alimony and other claims upon him. Hearing before *Lord, J.*, who reported the case in substance as follows:

The parties were married on November 24, 1870, in Malden in this Commonwealth, and thereafter lived together as husband and wife in Boston until March 20, 1877, excepting that in the summer of 1872 they went to the libellee's father's house at Plymouth in the county of Penobscot and State of Maine, and stayed there a week or ten days, and in the summer of 1874 the libellant went there and stayed three or four months, during which time the libellee came there twice, and stayed two or three days each time, and always while there they lived together as husband and wife. They had three children, one of whom, a boy, is still living. On March 20, 1877, she left her husband's house in Boston, and filed a libel for divorce against him in this court, in which he appeared, and which, after hearing, was dismissed, without any order as to the custody of the surviving child.

The libellee soon afterwards took this child, with the libellant's consent, and went to his father's house in said Plymouth, where the libellee was born and lived until of age, and where his parents have ever since lived; and on August 14, 1877, filed against this libellant in the Supreme Judicial Court for the

County of Penobscot and State of Maine, the libel which is copied in the margin.*

Notice thereof was ordered to be served on her personally, and was served accordingly on August 20, 1877. She employed counsel here, who by her direction employed counsel in Maine to appear for her in that suit, and who did appear for her, as shown by the record and docket, and was present at the hearing and took part in the proceedings as her counsel. That court afterwards entered the following decree: "And now the libellant appears, and enters his libel, and proves to the satisfaction of the court that notice had been given, as required by the fore-

* "To the Honorable Justices of the Supreme Judicial Court next to be holden at Bangor within and for the County of Penobscot, on the first Tuesday of October, A. D. 1877:

"Ephraim A. Loud, of Plymouth in the County of Penobscot, respectfully libels and gives this honorable court to be informed, that he was married to Elizabeth O. Watts, of Fredericton, Province of New Brunswick, at Malden in the Commonwealth of Massachusetts, on the twenty-fourth day of November, A. D. 1871; that, since their intermarriage, he has always behaved himself toward said Elizabeth as a true, faithful and affectionate husband; that they have frequently cohabited in this state; but that the said Elizabeth, unmindful of her marriage vows as aforesaid, has treated your libellant with extreme cruelty, was very irritable and ill-tempered, causing your libellant great anxiety and trouble in body and mind; that she was in the habit of slandering your libellant in the community in which they lived; and in February last she abandoned your libellant, taking with her their two children (one of which died soon after); that she immediately instituted proceedings for a divorce from your libellant, in the courts of Massachusetts, charging your libellant with extreme cruelty, and further charging your libellant with the crime of adultery; that, on said libel, a hearing was had before Chief Justice Gray, of the Supreme Court of Massachusetts, in the month of May last, who then and there, after hearing your libellant's case, refused to grant a divorce, without calling upon your libellant to make a defence, and ordered the living child to be given to your libellant, which child is now with your libellant at Plymouth aforesaid. And your libellant further represents, that there is no prospect of their ever living together again; that she has declared that she would never live with him again, and that their separation must necessarily be permanent.

"Wherefore, inasmuch as it would be conducive to domestic harmony, and in accord with the peace and morality of society, your libellant prays that a divorce from the bonds of matrimony may be granted between him and the said Elizabeth. And thus in duty bound will ever pray.

"Bangor, August 14, 1877.

Ephraim A. Loud."

going order; but the said libellee, though called to come into court, fails to appear, but makes default. Now therefore, after hearing all matters relating to said libel, it is considered by the court that the allegations therein set forth are true; and it is ordered and decreed by the court, on the third day of the term, being the fourth day of October, A. D. 1877, that said Ephraim A. Loud be divorced from the bonds of matrimony heretofore existing between him and the said Elizabeth O. Loud."

After that libel had been served upon her, she, through the intervention of friends, consented to withdraw opposition thereto; and agreed to execute, upon receipt of the sum of \$3000, and on October 14, 1877, with full knowledge of all the facts, upon the payment to her of that sum, (which she has since retained,) did execute, and acknowledge before a justice of the peace in this Commonwealth, the release which is copied in the margin,* and the same was recorded in the registry of deeds for this county. At the time of such negotiation and receipt, she supposed that that court had jurisdiction of the subject-matter of the libel and of the parties; and such belief was not caused by fraud of this libellee; and both parties supposed that that decree was valid

* "Know all men by these presents: That I, Elizabeth O. Loud, of Boston in the County of Suffolk and Commonwealth of Massachusetts, formerly the wife of Ephraim A. Loud, of Plymouth in the County of Penobscot and State of Maine, by whom a decree of divorce was obtained from me in the Supreme Judicial Court of Maine, on the fourth day of October 1877, in consideration of three thousand dollars in money, to me paid by said Ephraim A. Loud, formerly of said Boston, the receipt whereof is hereby acknowledged, do hereby remise, convey, release and forever quitclaim unto the said Ephraim A. Loud any and all right, claim or interest in or to any and all lands or estate now or formerly owned by said Ephraim A. Loud; especially releasing all claims to dower or homestead in or to any and all land or estates now or formerly owned by said Ephraim A. Loud. And in consideration of said three thousand dollars, I do hereby release and discharge said Ephraim A. Loud from all claims for support, and from all claims of alimony, maintenance, and from all claims and demands of every and all kinds; meaning and intending this to be a full release and discharge of said Ephraim A. Loud to me, of all things whatsoever.

"In witness whereof, I, the said Elizabeth Octavia Loud, hereunto set my hand and seal this fifteenth day of October in the year of our Lord one thousand eight hundred and seventy-seven.

"Elizabeth O. Loud. [Seal.]"

everywhere. She testified, on cross-examination at the hearing of the present case, that she then desired that a decree of divorce should be obtained in the suit in Maine.

On March 18, 1878, this libellee married in the State of Maine another woman, a resident of that state, according to the law of that state, and this marriage was consummated by sexual intercourse, and a few days afterwards they came to Boston, and have since lived together here as husband and wife.

The libellee contended that he did not in 1877 go to the State of Maine to obtain the divorce, or with any purpose to obtain a divorce; and offered evidence tending to show that, when he left Boston and went to Plymouth, Maine, in May 1877, he was sick, and went to his father's house intending to remain there permanently, and that at the time of filing his libel he had acquired a domicile in Plymouth.

But the judge found, as a fact, that the libellee was, during the whole year 1877, domiciled in and a citizen of this Commonwealth, and did not acquire a domicile in or become a citizen of the State of Maine; and ruled, as matter of law, that this finding rendered wholly immaterial the question whether the libellee, when he went to Maine, had a purpose to obtain a divorce.

The judge also found, subject to the libellee's objection to their competency, the following facts: 1st. The parties to this suit were not married in the State of Maine. 2d. They had not cohabited together as man and wife in that state, within the meaning of the Rev. Sts. of Maine of 1871, c. 60, § 2.* [See *Calef v. Calef*, 54 Maine, 365.] 3d. The husband had not resided in the State of Maine during the year preceding the filing of his libel, nor during any year after their marriage. 4th. The causes of divorce alleged in that libel did not accrue in that state.

* "A divorce from the bonds of matrimony may be decreed by the Supreme Judicial Court, in the county where either party resides at the commencement of proceedings, when the judge deems it reasonable and proper, conducive to domestic harmony and consistent with the peace and morality of society, if the parties were married in this state, or cohabited here after marriage, or the libellant resided here when the cause of divorce accrued, or had resided here in good faith one year prior to the commencement of proceedings."

It was agreed that the acts of the Legislature and the decisions of the Supreme Judicial Court of Maine might be referred to by either party; that if in the opinion of the full court the judge's construction of the meaning of cohabitation was not in accordance with the law of Maine, the finding upon that fact should be reversed; and that if, upon the facts and findings above stated, so far as competent, the libellant was entitled to a decree of divorce, such decree should be entered; otherwise, the libel should be dismissed.

W. Gaston & C. E. Hubbard, for the libellant.

E. R. Hoar & J. B. Richardson, for the libellee.

GRAY, C. J. This case differs from that of *Sewall v. Sewall*, 122 Mass. 156, in three respects: 1st. It has not been found that the husband went to the State of Maine to obtain a divorce, in violation of the Gen. Sts. c. 107, § 54. 2d. The wife had notice of his libel in Maine, and appeared by counsel in answer thereto. 3d. She executed to him a release, reciting the decree of divorce obtained by him from her in Maine, and, in consideration of a sum of money paid by him to her, releasing all right of dower or homestead or other interest in his lands, and discharging him from all claims for alimony, support or maintenance, and all other claims whatsoever.

Whether, no violation of our statutes being shown, and the wife having appeared in the suit in Maine, it would, if she had done nothing more, have been open to her to impeach the validity of the decree of divorce obtained there, by proving that her husband's domicil continued to be in this Commonwealth, is a question upon which there has been some difference of judicial opinion, and which we are not now required to decide. See Gen. Sts. c. 107, §§ 54, 55; *Chase v. Chase*, 6 Gray, 157; *Jackson v. Jackson*, 1 Johns. 424; *Sanford v. Sanford*, 5 Day, 358; *Kinnier v. Kinnier*, 45 N. Y. 535; *People v. Dawell*, 25 Mich. 247; *Donegal v. Donegal*, 3 Phillim. 597; *Chichester v. Donegal*, 1 Addams, 5; *Zycklinski v. Zycklinski*, 2 Sw. & Tr. 420; *Callwell v. Callwell*, 3 Sw. & Tr. 259; *Garstin v. Garstin*, 4 Sw. & Tr. 73; *Shaw v. Gould*, L. R. 3 H. L. 55; 2 Bishop Mar. & Div. (5th ed.) §§ 144, 163 a.

The conclusive answer to this libel is, that the wife not only appeared in the suit brought by the husband, but that she

afterwards executed a release, reciting the divorce therein obtained by him, and for a pecuniary consideration discharging all her claims upon him or his estate. Having done this, she cannot treat his subsequent marriage and cohabitation with another woman as a violation of his marital obligations to herself. The defence is allowed, not upon the ground of a strict estoppel, but because her own conduct amounts to a connivance at, or acquiescence in, his subsequent marriage. *Kirrigan v. Kirrigan*, 2 McCarter, 146. *Palmer v. Palmer*, 1 Sw. & Tr. 551. *Boulting v. Boulting*, 3 Sw. & Tr. 329, 335. *Gipps v. Gipps*, 3 Sw. & Tr. 116, and 11 H. L. Cas. 1. *Pierce v. Pierce*, 3 Pick. 299. *Lyster v. Lyster*, 111 Mass. 327, 330. See also *Smith v. Smith*, 13 Gray, 209, in which the point decided was that a decree of divorce, obtained in another state, *ex parte*, and in violation of the Gen. Sts. c. 107, § 54, was no bar to a libel previously filed in this Commonwealth by the same libellant for the same cause.

Libel dismissed.

JOSEPH H. LATHROP, executor, vs. WILLIAM W. PAGE.

Suffolk. November 11, 1879; March 25. — June 24, 1880.

Part payment of a debt, after its maturity, is not a sufficient consideration for a discharge, not under seal, of the remainder.

In an action by the executor of C. against the indorser of a promissory note, it appeared that, before the maturity of the note, the plaintiff and the defendant executed an indenture, which recited that there had been a partnership between the defendant and C., which was dissolved by the death of C., and that an arrangement had been made by which the plaintiff, as executor of C., was to take all the property of the partnership and pay all its debts and liabilities, and also to release the defendant from all sums "which he may be owing said copartnership, amounting to \$8000 more or less;" and by which the defendant assigned all the stock of goods, securities, debts and effects, in which he had any right by virtue of the copartnership, and all his interest therein, to the plaintiff, with full power to sue for, receive and collect the same; and the plaintiff covenanted that he would pay and discharge all the debts of the firm and would indemnify and hold the defendant harmless therefrom, and "doth hereby release and forever discharge" the defendant "from any and all sums which he is individually indebted to said partnership and to the estate of said C., being \$8000 more or less." *Held*, that the indenture applied to such debts only as were due from the defendant to the former partnership; and that, it not appearing that the note in suit was a partnership transaction, it was not affected by the release.

CONTRACT by the executor of the will of Lorenzo S. Cragin against the defendant as indorser of a promissory note for \$2500, dated August 6, 1875, payable two years after date to the order of the defendant, and signed by Harlan Page. On the back of the note were the following indorsements:

"We hereby guarantee the payment of the within note at maturity, value received, waiving all right of notice and demand.

"H. J. Culver.

Chas. L. Currier.

D. W. Page.

C. N. Conkey.

William W. Page."

"Received of H. J. Culver, C. L. Currier, D. W. Page and C. N. Conkey, Nov. 12, 1877, two thousand and sixty dollars on the within note, being four fifths of the amount thereof, and they are, in consideration thereof, hereby forever released from any attempt to collect from them or either of them the balance due on this note. Joseph H. Lathrop, executor."

The answer contained a general denial; denied that the defendant indorsed the note, and alleged payment and a release. Trial in the Superior Court, without a jury, before *Brigham*, C. J., who found that Harlan Page made, and the defendant indorsed, the note declared on; that, at the maturity of the note, legal demand of payment was made on Harlan Page, who failed to make payment, and legal notice of such demand and failure of payment was duly given to the defendant; that the persons, whose names appear on the back of the note as guarantors thereof, were guarantors thereof, and were released, in manner and form as stated on the back of the note, and that the plaintiff and defendant executed an indenture the material parts of which appear in the opinion.

Upon these facts, the judge ruled that the plaintiff was not entitled to recover; ordered judgment for the defendant; and reported the case, for the determination of this court, on the question of law arising on the releases. If the ruling was correct, the judgment was to stand; otherwise, a new trial to be had.

The case was argued at the bar in November 1879, by *S. Albee*, for the plaintiff, and *E. Avery*, for the defendant; and was afterwards submitted on briefs to all the judges.

AMES, J Two grounds of defence are advanced as an answer to the plaintiff's claim: first, that, by the memorandum indorsed upon the note, the plaintiff had released certain guarantors upon whom the defendant had a right to rely, and that the effect of this transaction was to release the defendant himself; and secondly, that, by the express terms of the indenture which is in the case, the plaintiff had released the defendant from all claims, including this particular one.

As to the first of these defences, even if the plaintiff had acquired any such right, legal or equitable, in the guaranty signed by Culver and others, that it was in his power to release the guarantors to the prejudice of the defendant, we do not find that he has done so. It appears that, about three months after the maturity of the note, and when, as we must suppose, the liability of the guarantors had become fixed, he received from them four fifths of the entire amount due, and gave each of them a release from the remainder. This was not the result of a general compromise with creditors, or of any arrangement to which the defendant was a party. There was no reservation of any rights against any other person, and it was nothing more than a promise, in consideration of payment of a part, to accept that part in full. The payment of part of an acknowledged debt after its maturity has often been held to be no sufficient consideration for a release, not under seal, of the remainder. It has no effect as an accord and satisfaction, and rests upon no legal or valid consideration. *Harriman v. Harriman*, 12 Gray, 341. *Potter v. Green*, 6 Allen, 442. *Jennings v. Chase*, 10 Allen, 526, and cases there cited.

We find it equally difficult to sustain the defence on the second ground. The indenture was made and executed in March 1877, about five months before the note became payable, and before it had been made certain that, by the failure of the previous parties to provide for it, it would ever become a debt actually due from the defendant. The indenture recites that there had been a partnership between the defendant and Cragin, which was dissolved by the death of Cragin; and that an arrangement had been made by which the plaintiff, as executor of Cragin, was to take all the property of the partnership, and pay all its debts and liabilities, and also to release the defendant

from all sums "which he may be owing said copartnership, amounting to \$6000 more or less." It then sets forth that the defendant assigns all the stock of goods, wares, merchandise, securities, debts and effects, in which he has any right, &c. by virtue of said copartnership, and all his interest therein, to the plaintiff, with full power to sue for, receive and collect. The plaintiff on his part covenants that he will pay and discharge all the debts of the firm, and will indemnify and hold the defendant harmless therefrom, and that he "doth hereby release and forever discharge the said Page from any and all sums which he is individually indebted to said partnership and to the estate of said Cragin, being \$6000 more or less." We are of opinion that this indenture was intended to provide for precisely the settlement described in the preamble to the instrument, and that it has no relation to any matters whatever, except such as belonged to or were connected with the partnership therein specifically described. This purpose of the indenture is distinctly expressed. The sums due from the defendant to the firm, and agreed to be released, are described in the preamble, and also in the clause containing the release, as "\$6000 more or less," and we cannot doubt that both refer to the same description of claims. Whatever the defendant owed the firm under this arrangement he owed "to the estate of Cragin," and there is nothing on the face of the instrument to countenance the suggestion that the use of those words was intended to introduce into the settlement a different class of claims, having no connection with the partnership. There being no evidence that the note in suit was a partnership transaction, it is not affected by the release.

The result is, that neither of the defences relied upon can prevail, and, by the terms of the report, there must be a

New Trial.

NEWELL R. CAMPBELL vs. FANNY M. BROWN & others.

Suffolk. Nov. 20, 1878. — June 25, 1880. COLT & MORTON, JJ., absent.

If the allegations of a bill in equity to enforce an express trust concerning lands clearly imply that the declaration of trust was not in writing, it may be availed of by demurrer.

A bill in equity, against the administrator and heirs of W., alleged that C., an uncle of the plaintiff, who, at the time of his death, was supporting the plaintiff, then an infant and an orphan, in the family of W., his brother-in-law, and who died without making a will, intended to make the plaintiff "the heir at law of one full half of all his property and estate;" that on his death-bed he gave direction that one half the same should be the property of the plaintiff; that the plaintiff's name should be changed; that W. should be appointed his guardian; that, after the settlement of C.'s estate, C.'s father, who was sole heir at law, "being desirous of carrying into full effect the intentions and wishes of his deceased son in relation to the plaintiff," at the instance and suggestion of F., who was the owner of one undivided half of certain land in another state, the title to the whole standing in the name of C. alone, and also at the instance of W., who had been appointed guardian of the plaintiff, executed and delivered a deed of this land to F., to C.'s administrator and to W., as copartners; that neither C.'s administrator nor W. paid any consideration for this conveyance, and that it was not the intention of the parties that W. should take any title therein in his own right, but only in his representative capacity; that he "never claimed any personal interest in said land, but only as the guardian of the plaintiff, and as holding under said deed in trust for the use and benefit of the plaintiff." *Held*, on demurrer, that the bill did not set forth any ground upon which to raise an express, implied, resulting or constructive trust for the benefit of the plaintiff; and that the bill could not be maintained.

ENDICOTT, J. The plaintiff by his bill, which was filed May 31, 1875, seeks to establish his title to certain lands in Michigan, or to the proceeds of the sales thereof, on the ground that, by the conveyance of those lands, in 1859, from John Campbell to George N. Fletcher, James Campbell and William White, as copartners under the name of the "Thunder Bay Lumber Company," the interest conveyed to White, who was then guardian of the plaintiff, vested in him in trust for the plaintiff. To enforce this trust against the administrator and heirs at law of White is the object of this bill.

Thomas Campbell, the son of John Campbell and uncle of the plaintiff, died in 1857. At the time of his death he was supporting the plaintiff, then a child of tender years and an orphan, in the family of William White, who was his brother-in-law, having married his sister. The bill alleges that it was the

intention of Thomas Campbell to make the plaintiff "the heir at law of one full half of all his property and estate;" that on his death-bed he gave direction that one half the same should be the property of the plaintiff; that the plaintiff's name should be changed from Newell Campbell Rogers to Newell Rogers Campbell, and that William White should be appointed his guardian. He also gave directions that the other half of his property, after providing for the suitable support and maintenance of his father and mother, should belong to his brothers and sisters. By reason of his sudden decease, he was unable to make a will.

No trust was created in favor of the plaintiff by these directions or declarations of Thomas Campbell on his death-bed; the allegations in the bill in relation to them clearly imply that they were oral, and, that fact appearing on the face of the bill, it may be taken advantage of by demurrer. *Ahrend v. Odiorne*, 118 Mass. 261, 268, and cases cited. As he died intestate and without issue, his father, John Campbell, became his sole heir at law, and all the property, both real and personal, vested in him, subject to the payment of debts. The property having thus come to him by law, he was under no obligation to pay over or convey any portion of it to the plaintiff, or to William White, his guardian. Nor could the plaintiff or White enforce such conveyance or payment against him or against the administrator of Thomas Campbell's estate. In no sense could property thus falling to the heir at law be said to be the property of the plaintiff, or that he had any interest, legal or equitable, therein. After the death of Thomas Campbell, White was appointed guardian of the plaintiff, and the plaintiff's name was changed to Campbell.

The estate of Thomas Campbell was settled by his administrator, James Campbell, and the balance of the personal property, after paying debts and expenses, was paid over to John Campbell, as sole heir at law. Whether there was any other real estate besides the Michigan lands does not appear, but the bill alleges that, after the settlement of the estate, John Campbell, "being desirous of carrying into full effect the intentions and wishes of his deceased son in relation to the plaintiff," at the instance and suggestion of Fletcher, who was the owner of one

undivided half of the lands in Michigan, the title to the whole standing in the name of Thomas Campbell alone, and also at the instance of White, who had been appointed guardian of the plaintiff, executed and delivered a deed of these lands to Fletcher, James Campbell and White, as copartners, by the name of the "Thunder Bay Lumber Company." It is alleged that neither Campbell nor White paid any consideration to John Campbell the grantor for this conveyance, and that it was not the intention of the parties that William White should take any title therein in his own right, but only in his representative capacity; and that he "never claimed any personal interest in said lands, but only as the guardian of the plaintiff, and as holding under said deed in trust for the use and benefit of the plaintiff." It is also alleged that James Campbell took nothing in his own right, but only in trust for his father, mother, and the brothers and sisters of Thomas Campbell. The deed is not before us, but it sufficiently appears that the conveyance was in form to William White in his own right, as a copartner with the other grantees, and contained no reference to the fact that White was guardian of the plaintiff, or took the title for him in any capacity.

Nor is it alleged that the intention or understanding of the parties, that William White took the conveyance as guardian of the plaintiff, arose out of any contract, declaration or agreement in writing. Giving the utmost force to these general and vague allegations, and assuming that there was some understanding between the parties that the conveyance to White was in his capacity as guardian, it was evidently oral, and was argued before us on that ground.

But an oral agreement that a grantee shall hold land, conveyed to him by a voluntary deed absolute in form, in trust for the grantor, cannot create a trust which can be enforced. *Titcomb v. Morrill*, 10 Allen, 15. *Bartlett v. Bartlett*, 14 Gray, 277. Nor can a trust be created in that manner for the benefit of a third person under such a deed. There certainly was no express trust, or any implied trust, created by the conveyance of John Campbell. See Gen. Sta. c. 100, § 19.

Nor does the bill allege facts from which a trust can result to the plaintiff, on the ground that John Campbell, being moved

by the moral obligations resting on him to carry out the wishes of Thomas Campbell, furnished the consideration of his deed in behalf of the plaintiff, and so that there was a resulting trust created in the plaintiff, on the familiar principle that a trust results to the one who advances the money for the purchase of an estate. At best, this is but an inference, arising out of the allegations in the bill, of the intention of the parties that the part conveyed to White absolutely was for the benefit of the plaintiff; and, as such intention cannot create a trust, express or implied, under such a deed, it cannot legally be inferred that John Campbell intended to furnish the consideration in behalf of the plaintiff. Nor is it alleged that White furnished any of the purchase money, or any consideration for the deed, from the money or property of the plaintiff; on the contrary, it is expressly alleged that he paid no consideration for the land. Nor did the plaintiff have any property in the land, which could be furnished for that purpose.

Nor can we find a constructive trust here arising out of the fraudulent conduct of the parties, or either of them, for no such fraud is alleged. John Campbell did not acquire the property by conveyance or will under any assurance that he would convey for the benefit of the plaintiff; nor is it alleged that White professed to act as guardian, and thereby obtained the conveyance for his own benefit in fraud of the rights of the plaintiff; nor that he obtained it without consideration by means of any assurances to John Campbell that he would hold it as guardian. The bill simply alleges that John Campbell made the conveyance, "at the instance and suggestion of Fletcher . . . and of William White, who had been appointed guardian of the plaintiff."

The case, therefore, does not fall within the class of cases which are cited by the plaintiff, where property is acquired by conveyance under such an assurance or promise, or where a guardian or trustee in dealing directly, in his fiduciary capacity, with the property or interests of his *cestuis que trust*, obtains a conveyance to himself, which must enure to the benefit of his *cestuis que trust*.

As we fail to find in the allegations of the bill any ground to raise any express, implied, resulting or constructive trust in this

land for the benefit of the plaintiff, we are of opinion that the demurrer was properly sustained; and the entry must be

Bill dismissed, with costs.

A. Russ, (*R. Lund* with him,) for the defendants.

L. Mason, for the plaintiff, cited *Dyer v. Dyer*, 2 Cox Ch. 92; *Milner v. Harewood*, 18 Ves. 258; *Nesbitt v. Tredennick*, 1 Ball & Beatty, 29, 46; *Eyre v. Dolphin*, 2 Ball & Beatty, 290; *Fox v. Mackreth*, 2 Bro. Ch. 400, and 2 Cox Ch. 320; *Kendall v. Mann*, 11 Allen, 15; *Glass v. Hulbert*, 102 Mass. 24; *Blodgett v. Hildreth*, 103 Mass. 484; *Jackson v. Stevens*, 108 Mass. 94; *McDonough v. O'Neil*, 113 Mass. 92; *Jenkins v. Eldredge*, 3 Story, 181; *Green v. Winter*, 1 Johns. Ch. 26; *Miller v. Pearce*, 6 W. & S. 97; *In re Heager's executors*, 15 S. & R. 65; *Galbraith v. Elder*, 8 Watts, 81; *Huson v. Wallace*, 1 Rich. Eq. 1; *Belcher v. Sanders*, 34 Ala. 9.

ELIAS R. CLEAVELAND vs. BOSTON FIVE CENTS SAVINGS BANK.

Suffolk. March 28, 1879. — June 25, 1880. COLT & AMES, JJ., absent.

Land conveyed to a single woman was, after her marriage, attached in an action against her by her maiden name, the creditor being ignorant of the marriage. Judgment was afterwards recovered against her by the same name, and the land was sold on execution. After the attachment and before judgment, the woman, by her married name, and adding her former name, mortgaged the same land to a person who had no actual notice of the attachment. *Held*, that the attachment took precedence of the mortgage. *Held, also*, that the fact that, after her marriage and before the attachment, she made a conveyance of land in the same county by her married name, was not constructive notice to the attaching creditor of the marriage.

A writ of entry against a mortgagee of land, to which the plea was *nul disseisin*, was submitted to the court on agreed facts, which set forth the respective titles of the parties and stated that the mortgagee had never taken possession of the demanded premises, although there had been a breach of condition. *Held*, that, if the demandant had the better title, he was entitled to judgment.

WRIT OF ENTRY, dated June 2, 1877, to recover a parcel of land in Chelsea. Plea, *nul disseisin*. The case was submitted to the Superior Court, and, after judgment for the tenant, to this court on appeal, on the following agreed facts:

The plaintiff claimed title to the demanded premises under a sale made on June 3, 1876, by virtue of a writ of execution issued upon a judgment recovered on March 20, 1876, in the Superior Court for Suffolk County, in a suit by the plaintiff against Elizabeth B. Howarth, in which suit a general attachment was made, on December 21, 1874, of the real estate of Elizabeth B. Howarth in Suffolk County. The sheriff's deed to the plaintiff bears date June 3, 1876, and was duly recorded the same day.

The tenant at the date of the demandant's writ in this action, was the owner of a mortgage upon the demanded premises, dated May 10, 1875, acknowledged May 17, 1875, and recorded August 9, 1875, from "Charles O. Manny and Elizabeth B. Manny, (formerly Elizabeth B. Howarth), his wife in her right." By the conditions of the mortgage, the mortgagors were to pay \$1400 in three years from date, and interest semiannually on June 1 and December 1 in each year. The usual clause, that until breach of condition the grantee should have no right to enter and take possession of the premises, was omitted. No actual possession of the premises under the mortgage, or otherwise, had been taken by the tenant. The interest on the mortgage debt was paid only to December 1, 1876.

Elizabeth B. Manny, whose former name was Elizabeth B. Howarth, was married to Charles O. Manny at some time prior to November 12, 1874, and took the name of Elizabeth B. Manny; and the premises were conveyed to her, and the deed recorded some years before her said marriage, when her name was Elizabeth B. Howarth.

A conveyance of other real estate in Suffolk County was made and recorded in the registry of deeds on November 14, 1874, by and in the name of Charles O. Manny and said Elizabeth B. Manny, his wife, in her right.

The plaintiff did not know or hear of the marriage of Elizabeth B. Howarth until after the entry of his writ in January 1875, and knew her only by her maiden name; and the cause of action upon which he obtained judgment against her was a contract, dated November 7, 1874, signed "Elizabeth B. Howarth by C. O. Manny."

On these facts the court was to enter such judgment as the case might require.

C. S. Lincoln, for the demandant.

C. F. Kittredge, for the tenant. The attachment of December 14, 1874, was not valid against this tenant, who took the mortgage without notice of any attachment. Although the defendant in the former suit did not plead the misnomer, yet the mortgagee was not a party to that suit, and can in no way be affected by anything she did or failed to do. It is immaterial to the issue in this case whether or not the demandant knew that Miss Howarth had become Mrs. Manny, or that his contract with her was in her former name. He was bound to know her correct name when he brought his suit, or take the consequences of bringing a suit and making an attachment which was of no effect.

The defendant in the first suit, in her legal name of Manny, made a conveyance of other real estate in Suffolk County, and the deed was recorded on November 14, 1874, a month and ten days before the plaintiff's attachment was made in the name of Howarth. The plaintiff now attempts to make the savings bank suffer for his ignorance of the defendant's name in the first suit. The savings bank had no notice and no means of knowing whether the real estate was under attachment except from the records and copies of writs filed in the registry of deeds.

At the time the mortgage was taken and recorded, there was no copy of a writ or record of any kind showing an attachment upon the real estate of Elizabeth B. Manny; and neither at the time when the mortgage was taken nor at the time when the attachment was made was there in existence any person by the name of Elizabeth B. Howarth. Gen. Sts. c. 123, §§ 51, 52. St. 1873, c. 297, § 1.

As the tenant was never in possession of the demanded premises, under its mortgage or otherwise, the demandant cannot recover possession of the premises in this action; his writ should have been brought against the party in actual possession. The fact that the semiannual instalment of interest on the mortgage note due June 1, 1877, had not been paid on June 2, 1877, when the writ in this action was brought, is immaterial. If there was default in the condition of the mortgage on June 2, 1877, it only gave the mortgagee the right to take possession, and not the

right of possession. Some act remained to be done by the mortgagee before it had any right of possession. *Farnsworth v. Boston*, 125 Mass. 1.

ENDICOTT, J. The demandant in this writ of entry brought an action, in December 1874, against Elizabeth B. Howarth on a written contract dated November 7, 1874, signed "Elizabeth B. Howarth by C. O. Manny;" and the demanded premises, the title to which then stood in the name of Elizabeth B. Howarth, were duly attached under a general attachment of all her real estate in the county of Suffolk. After the date of this contract, and before the action upon it was brought, she was married to Charles O. Manny; but of this fact the demandant had no knowledge until after the entry of his action against her. The case was prosecuted to judgment, execution issued thereon in March 1876, and, under a sheriff's sale, as provided in the St. of 1874, c. 188, the demanded premises were duly conveyed to the demandant in June 1876. She did not plead the misnomer, and, as the action proceeded to judgment and execution, it was a waiver of the error, and the execution could properly be enforced against her, and her property taken to satisfy it. *Trull v. Howland*, 10 Cush. 109. *Fitzgerald v. Salentine*, 10 Met. 436. *Sanford v. Hodges*, 11 Gray, 485. *Langmaid v. Puffer*, 7 Gray, 378. No question is made of her identity, and, as against her, the title of the demandant is complete. In *Scanlan v. Wright*, 13 Pick. 523, it was held that a deed to a married woman by her maiden name vested a title in her; she being known to the grantor only by her maiden name, and it appearing that she was the person to whom the conveyance was intended to be made, and that there was no other person claiming to bear the name used in the deed, or claiming title under it. Chief Justice Shaw said, "As to the deed being made to the female petitioner, we think it is the common case of a person known by different names."

The tenant sets up title under a mortgage deed of the demanded premises, signed and executed by Charles O. Manny and Elizabeth B. Manny in her own right, and dated and acknowledged in May 1875; and it is contended that the tenant had no means of knowing whether the demanded premises were under attachment, except from the records and copies of writs on file in the registry of deeds, as provided in the Gen. Sts. c. 123,

§§ 51, 52; St. 1873, c. 297, § 1; that, at the time the mortgage was taken, there was no record or copies showing an attachment of the estate of Elizabeth B. Manny; and that the attachment actually recorded is invalid as against the mortgage.

But we are of opinion that this position is untenable. The attachment of the demanded premises, which stood in the name of Elizabeth B. Howarth, having been conveyed to her some years before her marriage, was duly made, and copies of the original writ and of the officer's return, as provided by law, were deposited in the registry of deeds, as required in the St. of 1874, c. 293. The demandant at that time did not know that she had been married and bore another name, but he brought his action against the right person, and the property attached was her property. Nothing seems to have been omitted intentionally, which the law requires, on the part of the demandant or the officer, to make the attachment on the writ effectual. It was not the case of the use of the name of another person, or of the fraudulent use of a fictitious name, or of a fraudulent attempt to conceal the fact that an attachment had been made. *Ouimet v. Sirois*, 124 Mass. 162. And it would seem also that, when the officer had deposited the copies in the registry, he had done all that the law required of him to do, in order to make a valid attachment, even if the record did not distinctly disclose that the attachment had been made. *Sykes v. Keating*, 118 Mass. 517. But the record here did distinctly disclose that this property had been attached in the name of the person in whom the record title stood. The tenant had the means of ascertaining the attachment, and from the recitals of the mortgage deed had such knowledge of Elizabeth B. Howarth's marriage, and of the fact that the demanded premises were conveyed to her before marriage, by a deed recorded in her maiden name, as to put it upon inquiry and search of the records after as well as before her marriage. An examination of the records for conveyances by Elizabeth B. Howarth of this property, recorded before her marriage, would not have been sufficient, for she may have made a deed while unmarried, but recorded after marriage and before the mortgage. So proper precaution required the tenant to examine the records for attachments in suits against her before marriage in her maiden name, and for attachments against her in that name after as well as before her

marriage. An attachment of these premises made before her marriage, on a writ against her in the name of Elizabeth B. Howarth, would not necessarily be recorded till after her marriage; for if the sheriff deposits the copies of his writ and attachment in the registry "within three days after the day on which the attachment is made, the attachment shall take effect from the time it is made; otherwise, from the time the writ or copy is so deposited." Gen. Sts. c. 123, § 54. This section is amended by the St. of 1860, c. 70, which provides that the attachment shall not take effect against purchasers for a valuable consideration and in good faith, until the writ or copy has been deposited.

A search, therefore, of the registry must have disclosed this attachment, although it was made on a writ dated some time after the marriage. The tenant was put upon inquiry, had the means of ascertaining the attachment, and, if it had exercised proper caution, would have known it. The tenant thus took its mortgage subject to the attachment.

The fact that Elizabeth B. Manny made a conveyance, after her marriage and before the attachment, of other real estate in the county of Suffolk standing in her maiden name, was not constructive notice to the demandant of her marriage.

The fact that the tenant was not in possession is not decisive. The pleadings put in issue only the demandant's title; *Johnson v. Boardman*, 6 Allen, 28; and, the case being submitted on an agreed statement of facts, it may be decided on the merits, and the only question open is whether the demandant can recover against the tenant in any form of action. *Esty v. Currier*, 98 Mass. 500. *West Roxbury v. Minot*, 114 Mass. 546, and cases cited. As the attachment, upon the facts before us, took precedence of the mortgage, there must be

Judgment for the demandant.

ELLEN LOONEY vs. ARCHIBALD McLEAN.

Suffolk. November 17, 1879. — June 25, 1880.

A landlord who lets rooms in a building to different tenants, with a right of way in common over a staircase, is bound to use reasonable care to keep such staircase in repair; if he fails to do so, he is liable to a tenant injured thereby while in the exercise of reasonable care; and the fact that the tenant uses the staircase after knowing that it is in a dangerous condition is not conclusive evidence that he is not in the exercise of due care.

TORT for personal injuries occasioned to the plaintiff by a fall from a staircase in a dwelling-house in Boston, owned or occupied by the defendant. Trial in this court, before *Ames, J.*, who allowed a bill of exceptions in substance as follows:

The defendant was in the habit of letting tenements in the house in question to various tenants. The plaintiff's husband hired a tenement of the defendant, and began to occupy it on May 11, 1878. There was evidence that, at that time, the defendant pointed out the top of an outbuilding, connected with the house, as the place where the plaintiff was to hang out clothes for drying. There was a staircase in two flights leading from the ground of the back yard to the top of the outbuilding; and the plaintiff, on May 15, while going up the stairs to hang out her clothes for drying upon the roof, received the injuries complained of, in consequence of the giving way of one of the steps of the staircase. It was admitted that the defendant knew that the stairs were greatly decayed and unsafe, and there was no evidence that he cautioned or notified the plaintiff that they were so. The tenants in the building were in the habit of passing through the rooms on the second story occupied by a tenant, when they had occasion to go to said roof. Whether this access to the roof was pointed out to the plaintiff was in dispute, and the evidence on that point was conflicting. There was no other visible external means of access to the roof except by the above-described stairs. It was in evidence that the stairs had been substantially disused for many years. Some of the witnesses testified that two of the steps were broken away, and had wholly disappeared, two years before the accident. The plaintiff testified that only one step was missing, and that she undertook to

go up the stairs, not knowing that there was any other access, and, on cross-examination, testified that when she began to go up the steps she heard a crack under her feet, and felt a sort of yielding under her, but made haste to go up without any further examination into the condition of the stairs.

The defendant asked the judge to rule as follows: "1. A landlord does not guarantee the soundness of the premises let to his tenants, nor is there any implied warranty or guaranty on his part. 2. If the jury find that the steps in question were not used as a means of access to the shed where clothes were hung to dry, then the plaintiff went upon them at her own risk, and the defendant is not liable for the injuries received thereby. 3. The fact that the plaintiff has testified that she hurried up the steps without observing their condition at the time, and that she made no inquiries whether those steps were used for the purpose of access to the shed, is such evidence of the want of due care on her part that she is not entitled to recover. 4. If the jury find that two steps were gone at the time of the accident, and the plaintiff attempted to pass over them, she was not then in the exercise of due care, and is not entitled to recover."

The judge declined so to rule, and instructed the jury as follows: "In the case of landlord and tenant, there is no implied warranty on the part of the former that the demised premises are tenantable or in good condition, the tenant being supposed to examine and judge for himself. This rule, however, does not literally apply to the passageways, staircases and door-steps that are meant for general use by all the tenants; and no one of the tenants is responsible for the repairs of such places. The landlord is bound to keep such parts of the premises as are intended for the common use of all the tenants in such a state of repair that they can be safely used, or at least to caution the tenants not to use them if they are not safe. If the stairs were apparently intended to furnish a passage to the roof, and if the plaintiff had not been cautioned not to go that way, and if there was nothing in the appearance of the stairs that would indicate to a prudent person that they were unsafe, she might properly go there; but if they were manifestly in such a ruinous and decayed state that she ought to have seen or known that they

were dangerous, she could only go there at her own risk. If she had been cautioned not to go up the stairs, and if another access had been pointed out to her, she cannot hold the defendant responsible for the accident."

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

A. R. Brown & E. A. Alger, for the defendant.

J. R. Murphy, for the plaintiff.

COLT, J. The plaintiff's husband hired and occupied one of several tenements in the defendant's building. The jury, under the instructions given, have found that she was injured, without fault on her part, while using a defective stairway apparently intended to furnish access to the roof of a shed used in common by the other tenants for drying clothes. They must have found, also, that no other mode of access had been pointed out to the plaintiff; that no caution had been given as to the use of these steps; and that there was nothing in their appearance which would indicate to a prudent person that they were unsafe. The instructions given were sufficiently favorable to the defendant. They made him responsible only for such parts of his house as remained under his own general control and management.

There is no implied warranty in the letting of a house that it is safe and fit for habitation. A lease does not imply any particular state of the property let, or that it shall continue fit for the purposes for which it is let; unless otherwise stipulated, the tenant takes the premises as they are, and must pay the rent for the term. But this rule applies only to premises which, by the terms of the lease, have passed out of the control of the landlord into the exclusive possession of the tenant. Where a portion of a building is let, and the tenant has rights of passageway over staircases and entries in common with the landlord and the other tenants, there is no such leasing as will exonerate the landlord from all responsibility for the safe condition of that portion of which he still retains control, and which he is bound to keep in repair; as to such portion, he still retains the responsibilities of a general owner to all persons, including the tenants of his building. *Leavitt v. Fletcher*, 10 Allen, 119. *Foster v. Peyser*, 9 Cush. 242. *Readman v. Conway*, 126 Mass. 374. *Milford v. Holbrook*, 9 Allen. 17.

The case shows that the plaintiff had a simple right of access to the shed over this staircase, as incident to her occupation of the premises leased to her. The duty of the defendant, having still the possession and control of the same, was to protect her from injury in that right by the use of reasonable care on his part. The stairway was apparently intended to furnish a passageway for her use; and the defendant is responsible for injuries received by one entering upon the same by his invitation or procurement, express or implied. *Sweeny v. Old Colony Railroad*, 10 Allen, 368. *Elliott v. Pray*, 10 Allen, 378.

The fact, if proved, that the plaintiff had previous knowledge that the stairs were in a dangerous condition, would not be conclusive evidence that the plaintiff was not in the exercise of due care. *Whittaker v. West Boylston*, 97 Mass. 273. *Reed v. Northfield*, 13 Pick. 94.

The requests for instructions, in the form presented, were properly refused. *Exceptions overruled.*



NATIONAL RUBBER COMPANY *vs.* WILLIAM C. SWEET & others.

Suffolk. March 2. — June 26, 1880. ENDICOTT & SOULE, JJ., absent

In an action for the price of goods sold and delivered, the defendant contended that he made an entire contract for the purchase of a larger quantity than was delivered, and sought to recoup the damages he had sustained by reason of the delivery of only a part. It appeared that the contract was for the purchase of a certain number of cases of goods, and the kinds, sizes and quality of the goods were specified. The plaintiff contended that the contract was conditional on his having the goods in the stock then on hand. The defendant contended that the contract was for an absolute sale of the number of cases ordered. The evidence upon this question, and upon the question whether the plaintiff had the entire number of cases in stock, was conflicting. The defendant testified that the "sizes he ordered were the ordinary run of sizes." He was then asked, against the plaintiff's objection, "whether other sizes varying more or less from them would have been equally convenient to him in his business;" which question he answered in the affirmative. *Held*, that the admission of the question and answer afforded the plaintiff good ground of exception.

MORTON, J. This is an action of contract upon an account annexed, to recover the balance due for one thousand cases of

rubber goods sold to the defendants. The defence is, that the plaintiff made an entire contract to furnish the defendants two thousand cases of rubber goods; that the plaintiff refused to perform the contract by furnishing the second thousand cases; and that the defendants thereby sustained damage to an amount greater than the balance claimed, which they have the right to set off by way of recoupment in this action. It is not controverted that the defendants made a contract with Clapp, the plaintiff's agent, for the purchase of two thousand cases of goods; and that they particularly specified the kinds, sizes and quality of the goods bought.

The controversy is as to the terms and conditions of the contract of sale, the defendants contending that it was for an absolute sale of the two thousand cases ordered, the plaintiff contending that it was a contract for the sale of the two thousand cases if it was found that Clapp had the goods in the stock then on hand in his store. There was much conflicting evidence upon this matter of controversy. William C. Sweet, one of the defendants, was the principal witness in their behalf. He testified, among other things, that the "sizes he ordered were the ordinary run of sizes." His counsel then asked him "whether other sizes varying more or less from them would have been equally convenient to the witness in his business." The court permitted the question to be put, against the objection of the plaintiff, and the witness answered in the affirmative.

We are of opinion that the question and answer were incompetent. The contract, whether absolute or conditional, being for specific kinds and sizes, the plaintiff was not required or permitted to furnish, and the defendants were not required to accept nor entitled to call for, other kinds and sizes. The fact that other sizes would be equally convenient to the defendants has no tendency to prove any of the issues in the case, and was therefore incompetent. Logically considered, the evidence was entirely immaterial; but we cannot say that its admission may not have been prejudicial to the plaintiff. It is impossible to tell from this bill of exceptions whether the jury found for the defendants upon the ground that the contract was an absolute one, in which case the evidence might have been harmless, or upon the ground that, the contract being conditional as claimed by

the plaintiff, the latter could have performed it by the delivery of goods on hand in the store of Clapp at the time the contract was made. There was conflicting evidence upon this last-named ground. In considering it, the jury would be likely to be prejudiced against the plaintiff, if their minds were impressed with the conviction, which the incompetent evidence tended to create, that the sizes of the goods ordered were of no consequence. The evidence was offered and urged by the defendants. It was incompetent, and may have been injurious to the plaintiff; and we are therefore of opinion that it is entitled to a new trial.

As for this reason there must be a new trial, it is not necessary to discuss the other exceptions taken by the plaintiff.

Exceptions sustained.

J. D. Ball, for the plaintiff.

R. D. Smith, (*M. M. Weston* with him,) for the defendants.

WILLIAM J. VASS vs. ELIZABETH A. W. WALES.

Suffolk. March 15. — June 28, 1880. AMES & LORD, JJ., absent.

The acceptance of a lease containing a covenant that the lessee will give up the demised premises to the lessor at the end of the term in as good order and condition "as the same now are or may be put into by the lessor," is a sufficient consideration for an agreement, executed and delivered by the lessor contemporaneously with the lease, which refers in terms to the lease, and in which the lessor binds himself to make forthwith certain repairs upon the premises.

An agreement to submit to arbitration, the effect of which is to oust the courts of jurisdiction, is invalid.

An agreement, executed and delivered by a lessor contemporaneously with a lease of certain greenhouses, recited that the boiler and heating apparatus were not in satisfactory order, and other small repairs were needed in and upon the houses; and, in consideration of the lease, the lessor agreed to put the boilers and heating apparatus in good working order, to furnish the lumber required to repair the benches, and to put the houses "generally in good working order." *Held*, that he was required to do only the work in and upon the greenhouses themselves, necessary to put them in good order; and not to place guards on the roof of an adjacent building on the demised premises to protect the greenhouses from snow and ice which might slide from that roof.

CONTRACT upon an agreement in writing. At the trial in the Superior Court, before *Colburn, J.*, the jury returned a verdict

for the plaintiff; and the defendant alleged exceptions, the substance of which appears in the opinion.

J. Nickerson, for the defendant.

L. M. Child, for the plaintiff.

ENDICOTT, J. 1. The defendant leased to the plaintiff for the term of five years certain land and greenhouses, by an indenture which contained the covenant that the lessee would give up the premises to the lessor at the end of the term in as good order and condition "as the same now are or may be put into by the lessor." At the same time, the lessor executed the agreement sued on, which refers in terms to the lease, and was delivered to the lessee with the lease, wherein she binds herself to make forthwith certain repairs upon the premises. Both papers were parts of the same transaction, and the court properly ruled that there was a sufficient consideration for the agreement.

2. The agreement contained the provision that, in case of dispute between the parties whether certain of the repairs, which the lessor was bound to make, were sufficient, the question should be referred to an umpire. The refusal of the court to rule that the plaintiff could not maintain his action, on that portion of his claim for damages, is not open to exception. No such question is raised in the answer; and if it were, it could be sustained only on the ground, that the agreement to refer ousts the court of jurisdiction, so far as these particular damages are concerned. And such an agreement would be invalid. *Rowe v. Williams*, 97 Mass. 163. *Pearl v. Harris*, 121 Mass. 390. *Evans v. Clapp*, 123 Mass. 165.

3. The remaining exception presents more difficulty. The end of one of the greenhouses abutted against the side of a barn, which was a part of the demised premises though not of the greenhouse itself. The plaintiff contended that, under the clause in the agreement providing that the greenhouses should be put "generally in good working order," the defendant was bound to place rails, bridges, or guards on the roof of the barn to protect the greenhouse from snow and ice which might slide from the roof.

The words of this clause would seem to relate solely to work to be done and repairs to be made upon the greenhouses themselves, and not to include any additions to the same, or upon

other structures on the demanded premises adjacent thereto. Nor do we find anything in the agreement from which it is to be inferred that a larger meaning is to be attached to the words; on the contrary, the purpose for which the agreement is made appears in the preamble, which recites that the boiler and heating apparatus are not in satisfactory order, and that other small repairs are needed in and upon said houses, and therefore, in consideration of the lease, the lessor agrees to put the boilers and heating apparatus in good working order, and to furnish the lumber required to repair the benches, and to put the houses "generally in good working order." The context thus clearly shows that the work required to put these houses in good order was to be done in and upon the houses themselves. See *Dwight v. Ludlow Manuf. Co.* 128 Mass. 280.

The ruling of the court, therefore, that it was a question of fact for the jury to determine whether these additions to the roof were required in order to put the house in good working order, was erroneous. *Exceptions sustained.*



JOHN CARLETON vs. AKRON SEWER PIPE COMPANY.

Suffolk. March 15. — June 28, 1880. AMES & LORD, JJ., absent.

The St. of 1877, c. 250, does not empower one magistrate to issue a certificate authorizing the arrest of a judgment debtor, on the first charge specified in the Gen. Sts. c. 124, § 5, it not appearing that he intends to leave the state, without notice to him to appear and submit himself to an examination touching his estate, although he has made default under a notice issued by another magistrate on an application on another execution issued upon the same judgment.

A debtor, who has been illegally arrested, does not by recognizing with surety before the magistrate authorizing the arrest, and submitting to examination and taking the oath for the relief of poor debtors, waive the illegality of his arrest.

TORT for false imprisonment. Trial in the Superior Court, before Colburn, J., who reported the case for the determination of this court, in substance as follows:

On September 4, 1877, an execution in common form was issued from the Municipal Court of Boston, in favor of the

defendant against the plaintiff for \$55.38 damage, and \$31.93 costs of suit. On September 12, 1877, the defendant's attorney applied to a magistrate for a certificate authorizing the arrest of the plaintiff on said execution, upon the first charge specified in the Gen. Sts., *c.* 124, § 5. The magistrate thereupon issued to the plaintiff a notice in the form prescribed by the St. of 1877, *c.* 250, § 6, to appear before him on September 15. This notice was served on the same day by leaving an attested copy thereof at the last and usual place of abode of the plaintiff; and, at the time and place mentioned in the notice, the plaintiff appeared, and his examination commenced. This examination was continued, from time to time, at the debtor's request and by agreement, until November 3, when the plaintiff made default, and did not again appear before the magistrate. This execution was returned in no part satisfied. On January 9, 1878, an alias execution was issued upon the same judgment, and was returned in no part satisfied. On March 29, a pluries execution was issued on the same judgment, upon which execution the defendant's attorney, in its behalf, on April 18, applied to a magistrate for a certificate authorizing the arrest of the plaintiff upon the same charge as before, and made affidavit in the usual form upon the execution. The magistrate issued a certificate, in the usual form, authorizing the arrest of the plaintiff and containing the following: "I also certify that it appears from the evidence before me, that said debtor has been duly notified to appear before John E. Fitzgerald, Esq., Master in Chancery, for examination, as provided in chapter 250 of the Acts of 1877, and has neglected and refused to appear." On April 20, the plaintiff was arrested on the last-named execution, and taken before a magistrate, recognized for his appearance in the usual form, gave the proper notice to the defendant, and, after examination, having performed all the conditions of his recognizance, took the oath for the relief of poor debtors on July 15, and was discharged by the magistrate.

The plaintiff contended that his arrest was illegal, because he was entitled to the notice provided by the St. of 1877, *c.* 250, on the pluries execution, before a certificate was granted authorizing his arrest. But the judge ruled that the action could not be maintained; and ordered a verdict for the defendant.

If the ruling was right, judgment was to be entered on the verdict; otherwise, the verdict was to be set aside, and a new trial ordered.

C. B. Southard, for the plaintiff.

C. P. Gorely, for the defendant.

SOULE, J. The arrest of the plaintiff was illegal. Since the St. of 1877, c. 250, went into operation, no magistrate has had authority to grant a certificate authorizing arrest on execution issued for debt or damages on the first charge specified in the Gen. Sts. c. 124, § 5, it not appearing that the judgment debtor intends to leave the state, until he has issued a notice to the debtor to appear and submit to an examination touching his estate, and the debtor, being duly served therewith, has failed to appear as directed by the magistrate, and to obey all lawful orders and requirements made by the magistrate. If the debtor fails to appear or to obey such orders, the arrest may be authorized, and the subsequent proceedings may be had as provided in the Gen. Sts. c. 124.

In the case at bar, the magistrate granted the certificate purporting to authorize the arrest of the plaintiff, without first issuing a notice to him to appear and submit to examination; and it is contended that this was in accordance with the requirements of the statute, because the plaintiff had made default under a notice to submit to examination issued by another magistrate on an application for a certificate on a former execution issued on the same judgment. This argument is founded on a misapprehension of the meaning and purpose of the St. of 1877. It is a modification of the provisions of the Gen. Sts. c. 124, as to arrest on execution for debt or damage when the application for authority to arrest is based on the charge that the debtor has property, not exempt from being taken on execution, which he does not intend to apply to the payment of the creditor's claim. Under the General Statutes the certificate authorizing the arrest might be granted on the affidavit of the creditor, or some one in his behalf, to the truth of the charge, and proof of the same to the satisfaction of the magistrate on a hearing *ex parte*. The effect of the St. of 1877 is to prevent the magistrate from granting the certificate till he has given the debtor an opportunity to be heard, and to avoid arrest by

transferring to his creditor any property which he may be found to have which cannot be levied on; but to leave the magistrate authority to grant the certificate if the debtor does not appear, or fails to obey his lawful orders. But the statute does not empower one magistrate to grant a certificate authorizing the arrest of a judgment debtor without notice to him, because it appears that he has made default before another magistrate on another application, on another execution. The proceedings on a notice to appear and submit to examination are of a judicial character, and if the debtor makes default or refuses to obey lawful orders he is exposed to a judgment against him, which is the granting of the certificate authorizing his arrest; but if the creditor does not ask for this when the default or disobedience occurs, or at some time to which the proceedings are continued, and the matter is suffered to drop, all advantage of the proceedings is lost to the creditor. He cannot avail himself of the default of the debtor, in a new application before another magistrate, as a reason for not issuing notice to the debtor to appear and submit to examination, any more than a plaintiff may obtain a judgment in an action at law without serving the defendant with process, on the ground that the defendant made default in another action for the same cause which was not prosecuted to judgment. The arrest of the plaintiff was illegal, even if the notice on the first execution was sufficient, which we do not decide.

It is argued, however, that the conduct of the plaintiff in recognizing with surety before the magistrate, and submitting to examination on his application to take the oath for the relief of poor debtors, and taking that oath, amounted to a waiver of the false imprisonment. This is not so. While it is true that the plaintiff must be presumed to know the law, and to know that his arrest was unlawful and that he was not bound to submit to any examination under it in order to be entitled to a discharge, the fact that he did these things is in no way an indication of any surrender of his right to redress for the wrong done to him by the false imprisonment, and the report does not indicate that the defendant was misled in this regard by his conduct. It does not appear from the report that this point was suggested in the court below.

The judge who presided at the trial in the Superior Court erred in ruling that the action could not be maintained, and, according to the terms of the report, there must be a *New trial.*

CHARLES POWERS *vs.* CHELSEA SAVINGS BANK.

Suffolk. March 22. — June 28, 1880. AMES & LORD, JJ., absent.

A question, which was in issue in a suit in equity, and was settled by the decree therein, cannot be tried anew in an action at law between two persons who were parties to that suit.

CONTRACT on an account annexed. At the trial in the Superior Court, before *Putnam, J.*, the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

R. M. Morse, Jr. & G. S. Forbush, for the defendant.

R. Lund, (D. F. Crane with him,) for the plaintiff.

ENDICOTT, J. The plaintiff in his declaration alleges that the defendant was the mortgagee of an estate in Revere, and that he was a creditor of the owner of the equity of redemption in that estate; that the defendant foreclosed its mortgage and sold the estate for the sum of \$8395, which was duly paid, of which sum the defendant was entitled to receive and retain the amount due upon its mortgage with interest and taxes amounting to \$6170.58, leaving a balance in its hands of \$2224.20. This balance the plaintiff alleges he is entitled to recover by virtue of judgment of the Superior Court, giving him all the right to the proceeds of the sale, after paying the amount due the defendant. The defendant in its answer alleges, among other defences, that all the matters set forth in the plaintiff's declaration were heard and determined in a bill in equity, wherein the plaintiff and defendant were parties, and that it has paid to the plaintiff all that it was required to pay by the decree. The bill in equity, together with the answer thereto and the decree of the court therein, is annexed and made part of this bill of exceptions.

It appears by the bill, which was originally brought by William S. Macfarlane against the defendant and one Mary Wilcutt.

that Macfarlane sought to enforce the payment of a sum of money, which he claimed to be entitled to receive from the balance in the hands of the defendant, which the plaintiff in this action seeks to recover. The defendant in its answer to the bill admitted to have received from the sale of the estate the sum of \$8395, and in the account annexed to its answer claimed to be entitled to retain from the sum so received, not only the amount due upon the mortgage note with interest and taxes, but also certain expenses incurred in selling the estate, amounting in all to \$6660, leaving a balance in its hands of \$1734; and the answer alleged that Charles H. Chellis and Charles Powers, the plaintiff in this action, also made claims to this surplus.

Thereupon the bill was amended, and the several persons were made parties who were alleged to have demands against this fund in the hands of the defendant bank; and they were summoned to appear in order that their several claims and liens upon the fund might be determined. Among the persons so summoned were Charles H. Chellis and Charles Powers, the plaintiff, who both appeared and answered. The plaintiff in his answer alleged that he was entitled to receive the surplus in the hands of the bank after paying the amount of its mortgage and interest thereon.

It is to be observed that the plaintiff in his answer thus claimed to be entitled to receive the whole balance in the hands of the bank after paying the mortgage debt with interest and taxes, which amounted to the sum of \$6170.72; this sum deducted from the amount received by the bank on the sale leaves \$2224.28, which is the amount which he claims to recover in this action.

Issue was duly joined on the answer, and a decree was entered, to which the parties, including the plaintiff and defendant in this action, consented; and, by that decree, the plaintiff Macfarlane was entitled to receive out of the funds or balance in the hands of the defendant bank the sum of \$300 with interest and costs, and after the payment to Macfarlane the bank was to retain its own costs as a party defendant, pay Charles H. Chellis \$150, and then to "pay the balance of said fund in its hands remaining, or for which it is properly accountable, to Charles Powers." The decree does not state the amount of that fund,

but it seems to be clear that the fund mentioned in the decree is the surplus of \$1734, which the bank by its answer admitted to be the balance in its hands, and to which it alleged that Chellis and Powers claimed to be entitled. But whether it was or not, this action cannot be maintained, because the amount that the plaintiff was to receive from the defendant was distinctly put in issue by the pleadings and determined in that court. If there is any doubt as to the amount of the sum named in the decree, from which the several payments are to be made, or if there is any mistake or ambiguity in the words quoted above, namely, "pay the balance of said fund in its hands remaining, or for which it is properly accountable, to Charles Powers," the remedy, if the plaintiff has any, should have been sought in that court; for the sum for which the defendant is "properly accountable" must mean accountable in that suit in equity, and cannot be passed upon and determined in this action at law. *Bigelow v. Winsor*, 1 Gray, 299. *Exceptions sustained.*

OSCAR IASIGI, administrator, *vs.* CHICAGO, BURLINGTON
& QUINCY RAILROAD COMPANY & another.

Suffolk. June 24. — 29, 1880. AMES, ENDICOTT & LORD, JJ., did not sit.

If the final decree of a single justice of this court, sitting in equity, is appealed from, without a report of the evidence upon which the decree was made, the only question upon the appeal is whether the decree is warranted by the allegations of the bill.

If a corporation issues a certificate of stock to a person as trustee, and, on his death, at the request of a person claiming to be entitled to the stock, refuses to examine the evidence offered and to permit a transfer, without a decree of court, it may, on a bill in equity against it to compel a transfer, if it appears that it could easily have satisfied itself of the truth of the facts, be ordered to pay costs as well as to make the transfer.

BILL IN EQUITY by Oscar Iasigi, administrator with the will annexed of Auguste Hilarion Dromel, late of Marseilles in the Republic of France, against the Chicago, Burlington and Quincy Railroad Company and Francis E. Parker. The material facts alleged in the bill were as follows :

Dromel for a considerable time next preceding his decease was engaged in business as a merchant at Marseilles, under the name and style of A. Dromel & Co., and was the sole proprietor of the business carried on under that name and style. He died on July 24, 1866, and, by his last will in writing in accordance with the laws of France, gave all his property to his wife and his only daughter, in the manner therein provided. The firm of Iasigi, Goddard & Co., merchants in Boston, of which Joseph Iasigi was the head, had various transactions with Dromel under the name of A. Dromel & Co. in his lifetime, some of which were not completed till after his death; and on March 23, 1869, the sum of \$41,310.73 was due from that firm to the personal representatives of Dromel as a final balance in respect of such transactions, and so appeared upon the books of the firm, and in an account current that day sent to such representatives at Marseilles, as to the credit of A. Dromel & Co. in liquidation.

Joseph Iasigi, at different times in March and April, 1869, at the request of Dromel's widow and daughter, invested that sum partly in stocks of the United States, and partly in the shares of different railroad corporations in the United States; and his firm received the interest and dividends thereof as they became payable, and on August 31, 1869, stated and transmitted to Dromel's widow and daughter at Marseilles an account current showing the investments of the principal and the sums received by them as the interest and dividends thereof; and Iasigi afterwards received and accumulated the interest and dividends of such investments down to January 24, 1874, and added them to the principal, and invested them as a part thereof, and occasionally varied the investments of the fund, and invested part of the fund in two hundred and eighty shares of the defendant corporation, and always held all the investments of that fund upon trust as part of Dromel's estate, and caused these shares to be placed on the books of the corporation in the name of himself, described as trustee, and obtained from the corporation certificates that he, thus described, was the owner of these shares, and they have ever since stood on the books of the corporation in the same name, and are transferable only on those books.

Joseph Iasigi died on May 22, 1877, and by his last will appointed the defendant Parker and the plaintiff executors thereof

and they on June 18, 1877, proved his will and took out letters testamentary in the Probate Court for the county of Suffolk. On December 30, 1878, the plaintiff obtained from the same court letters of administration with the will annexed of Dromel. Dromel's widow and daughter, by instrument in writing, requested the executors to transfer these shares to the plaintiff as such administrator, or to such persons and in such manner as he should order. At the request of the plaintiff, Parker and the plaintiff, as executors of the will of Joseph Iasigi, requested the corporation to allow them to transfer the shares on its books to Francis C. Welch and allow Welch to transfer the same on its books to the plaintiff as such administrator, and then make and deliver to the plaintiff in the usual form a certificate or certificates that the plaintiff as such administrator was the owner or holder of the shares. The executors and Welch offered respectively so to transfer the shares, and the executors offered upon such transfer to deliver up the certificates received from the corporation by Joseph Iasigi; and the plaintiff gave notice and offered evidence of said trust to the corporation. But the corporation refused to allow such transfers, or any transfer of the shares, except under an order or decree of court.

The bill prayed that it might be declared that the plaintiff as administrator with the will annexed of Dromel is entitled to the shares, and that the defendant corporation be directed to allow the executors to transfer them to Welch or some other person, who immediately upon such transfer should transfer them to the plaintiff as administrator as aforesaid, and, upon such transfer being made, to make and deliver to the plaintiff in the usual form a certificate that the plaintiff as such administrator is the owner or holder of the shares.

The case was heard upon pleadings and proofs, without any request for a report of the evidence, before *Soule, J.*, who made a decree for the plaintiff as prayed for, with costs. The defendant corporation appealed to the full court.

J. L. Thorndike, for the plaintiff.

S. Bartlett, for the defendant corporation.

GRAY, C. J. There being no report of the evidence, the only question open upon the record is whether the decree is warranted by the allegations of the bill. *Stanley v. Stark*, 115 Mass. 259

The bill is brought by the administrator with the will annexed, appointed in this Commonwealth, of Dromel, a citizen of France ; sets forth in detail the trust upon which Joseph Iasigi held, and had invested in shares of the defendant corporation, a sum belonging to Dromel at the time of his death ; alleges that Dromel by his will according to the laws of France bequeathed all his property to his widow and daughter, and that they have requested the executors of Iasigi to transfer these shares to the plaintiff ; shows that the corporation had notice upon the face of the certificate that Iasigi held the shares as a trustee ; and alleges that the plaintiff, with the concurrence of Iasigi's executors, has demanded a transfer of the shares, and given notice and offered evidence of the actual trust, but that the corporation has refused to allow any transfer of the shares, except under an order or decree of court.

Upon the allegations of the bill, if supported by evidence, the judge who heard the cause might well be of opinion that the corporation could easily have satisfied itself of the truth of the facts, and of its obligation to make the transfer demanded, if it had been willing to examine the evidence offered ; and that its absolute refusal to make any transfer whatever, except under a decree of court, was unreasonable and vexatious. Under such circumstances, even a trustee should be charged with the costs of a suit which his conduct has made necessary to be brought against him. *Penfold v. Bouch*, 4 Hare, 271. *Firmin v. Pulham*, 2 DeG. & Sm. 99. *Taylor v. Dowlen*, L. R. 4 Ch. 697. And we are not required to consider how far a corporation can be deemed a trustee as against the owners of its shares, or how far an appeal can be entertained in equity upon the question of costs only.

Decree affirmed, with costs.

OLIVER J. RAND vs. ALBERT J. WRIGHT, administrator.

Suffolk. March 4. — June 30, 1880. ENDICOTT & SOULE, JJ., absent.

The answer to a declaration upon an account annexed alleged that the plaintiff and the defendant accounted together, and the items of the plaintiff's claim against the defendant were passed upon and the amount of the items adjusted and agreed upon, and that the moneys owing from the plaintiff to the defendant were agreed upon, and a certain sum agreed upon by the parties, on accounting together, as the balance found due to the plaintiff, and in full settlement to a date specified. *Held*, on demurrer, that the defence of *insimul computassent* was sufficiently pleaded.

CONTRACT upon an account annexed for work done for the defendant's intestate.

The defendant answered that the work was done, and the prices were correct as stated in the account annexed; "but that the said plaintiff, and the defendant's intestate, during his lifetime, accounted together, and the said items were passed upon by the parties, and the amount was adjusted, and the money owing by the plaintiff to the defendant and the amount of said items were agreed upon, and the sum of forty six hundred and sixty-seven and $\frac{71}{100}$ dollars was agreed upon as the balance found due to the plaintiff by the parties on accounting together; the date of said accounting together being October 11, 1877, and the amount agreed upon as a balance being in full settlement to October 1, 1877."

The plaintiff demurred to the answer, "for that the same does not disclose any legal defence to the cause of action declared on, in this, that if the plaintiff and the defendant's intestate accounted together, as alleged in said answer, such accounting does not bar the plaintiff's right to recover the full amount of the items of his account as set forth in the declaration and admitted in the answer."

The Superior Court sustained the demurrer, and ordered judgment for the plaintiff for the full amount claimed; and the defendant appealed to this court.

A. E. Pillsbury, for the plaintiff.

C. T. Gallagher, for the defendant.

GRAY, C. J. Notwithstanding the confusion created by some early English cases, relied on in *Bump v. Phœnix*, 6 Hill, 308,

cited for the plaintiff, the law upon the question before us is clearly shown by the judgments of Lord Holt in *May v. King*, 12 Mod. 537; *S. C.* 1 Ld. Raym. 680; of Chief Justice Wilde in *Callander v. Howard*, 10 C. B. 290, and of Mr. Justice Blackburn in *Laycock v. Pickles*, 4 B. & S. 497, to be as follows:

In order to constitute an *insimul computassent* or account stated, it is sufficient that several items on each side of an account have been set against one another, and a balance struck, and that balance adjusted and agreed upon as the sum due from one party to the other; and in such case the consideration for the promise to pay the amount so found due is the discharge of the items on each side, and the several items and the considerations thereof need not be alleged, and, at least when there is no question of their legality, cannot be inquired into. By the rules of special pleading, indeed, a plea merely setting forth such facts would have been bad; bad in an action of debt or of covenant, because it did not plead the facts according to their legal effect, that is to say, as payment; bad in an action of assumpsit, because it amounted to the general issue, for in assumpsit, at common law, payment might be given in evidence under the general issue. But under the new rules of pleading in England, it was sufficient that the allowances in account should be in substance and effect, though not directly, pleaded as payment. And by our practice act, it is sufficient to plead the material facts necessary to constitute a cause of action, or a defence, without averring their legal effect. Gen. Sts. c. 129, §§ 2, 13, 17, 20, 27. *Chace v. Trafford*, 116 Mass. 529, 532.

The answer in the case at bar alleges, not only that the plaintiff and the defendant's intestate accounted together, and the items of the plaintiff's claim against the defendant were passed upon, and the amount of those items adjusted and agreed upon, but also that the moneys owing from the plaintiff to the defendant were agreed upon, and a certain sum agreed upon by the parties, on accounting together, as the balance found due to the plaintiff, and in full settlement to a date specified. The answer thus sets forth all the material facts necessary to constitute the defence, and the court below erred in sustaining the demurrer thereto. Its judgment must therefore be reversed, and the

Plaintiff's demurrer overruled.

HENRY R. HINCKLEY *vs.* UNION PACIFIC RAILROAD
COMPANY.

Suffolk. March 5. — June 30, 1880. ENDICOTT & SOULE, JJ., absent.

The owner of a stolen interest coupon payable to bearer, and which has not been paid by the promisor, is entitled to judgment in an action against the promisor, on filing a bond of indemnity, conditioned to save the defendant harmless against all lawful claims by any other person, and against all costs and expenses by reason of such claims.

The promisor of an interest coupon payable to bearer, and distinguishable from others by a number, who, after notice that it has been stolen, pays it when overdue to the person presenting it, without any inquiry as to his title, is liable to the true owner thereof; although the notice did not contain an offer of a bond of indemnity; although the promisor is a corporation having a very large number of such coupons outstanding, has been in the habit of paying overdue coupons as if still current, and, after the payment, gave notice to the true owner of the name of the person to whom payment had been made; and although the treasury department of the United States pays coupons on bonds, issued by the government and payable to bearer, to the person presenting them, without regard to notices that such coupons had been stolen.

CONTRACT in two counts. Writ dated May 13, 1879. The first count was upon the following instrument, declared on as a promissory note: "The Union Pacific Railroad Company will pay the bearer at its office in the city of Boston on the first day of March, A. D. 1876, forty dollars current money of the United States, or seven pounds British sterling money, at the option of the holder, at the banking-house of Messrs. Morton, Rose & Co., London, England, being the interest due at that date on its Sinking Fund Bond 5136. E. H. Rollins, Treas."

On the back of this instrument was the figure "5."

The second count was on an instrument precisely similar to the above, except that the number of the bond was 5135 instead of 5136, and it was also declared on as a promissory note.

The defendant filed no answer; but the case was submitted to the Superior Court, and, after judgment for the defendant, to this court on appeal, on agreed facts, which, after stating that the pleadings were made a part thereof, was in substance as follows:

On January 26, 1876, the plaintiff was the owner of two bonds, issued by the defendant on September 1, 1873, numbered

5135 and 5136 respectively, each bearing on its face the words "Sinking Fund Mortgage Bond," and by the terms of which the defendant promised to pay to the holder \$1000 in gold coin of the United States, or £200, twenty years from date, with interest at the rate of eight per cent per annum, payable semi-annually. Attached to each of these bonds, and printed on the same sheet with it, were originally forty coupons of the form set forth in the first count of the declaration, the first coupon being dated March 1, 1874, and each succeeding coupon bearing a date six months subsequent to that in the preceding coupon. The several coupons were numbered on the back from 1 to 40, and bore on their face the number of the bond to which they were attached.

Previously to January 26, 1876, the first four coupons on each bond had been cut off, and had been paid by the defendant. On the morning of that day, these bonds, with many other securities, were stolen from the Northampton National Bank, where they had been deposited by the plaintiff in a box; and the plaintiff, after diligent search, has been unable to recover the bonds or any of the coupons. At the same time, forty-two other bonds similar to those above mentioned were stolen from the plaintiff.

On February 26, 1876, the plaintiff sent to the defendant's treasurer the following notice: "Northampton, Mass., Feb. 26, 1876. E. H. Rollins, Esq., Treasurer Union Pacific Railroad Company, Boston. My dear Sir: I lost by the recent robbery of the Northampton National Bank, 42,000 Union Pacific Railroad Sinking Fund bonds, Nos. 5113 to 5154, inclusive. The bonds were originally issued to me, and have never been on the market. If you could stop payment of the coupons due on the 1st of March, or notify me by whom any of such coupons are presented, I should be exceedingly obliged to you. The Ohio and Mississippi Railroad Company have promised Mr. Edwards, president of the bank, to stop payment of any of the stolen coupons of their bonds whose numbers have been given them. I shall be very thankful for any protection you can offer me in the matter. Respectfully yours, Henry R. Hinckley."

The coupon declared on in the first count was attached to the bond numbered 5136. Neither the plaintiff nor the defendant

knows where that bond and coupons are. No coupon of that bond has, since January 27, 1876, been presented to the defendant for payment.

On April 18, 1879, the plaintiff (who had previously recovered twenty-five of the stolen bonds, and had replevied from the Merchants' Bank, of Boston, some of the coupons attached to certain of the other bonds, which coupons, after such replevin, he presented to the defendant, who paid them, taking from the plaintiff a bond of indemnity against the claim of the Merchants' Bank or other owner of said coupons) made a formal demand upon the defendant for the payment of the amounts due on those coupons which were then due and which he had not then presented, offering to give a bond of indemnity. Among the coupons included in this demand were those belonging to bonds 5135 and 5136.

On April 21, 1879, Messrs. Kidder, Peabody & Co., bankers, presented to the Union Trust Company, the agent of the defendant in New York, in one lot, fourteen coupons: seven belonging to the above-described bond numbered 5135, and due on March 1, 1876, September 1, 1876, March 1, 1877, September 1, 1877, March 1, 1878, September 1, 1878, and March 1, 1879, respectively, and seven bearing the same dates and belonging to bond 5134, which was one of the bonds stolen and never recovered. These fourteen coupons were covered by the demand made on April 18, 1879. The Union Trust Company (to whom a copy of the plaintiff's letter of February 26 had been duly transmitted, together with a letter from the defendant dated February 29, 1876, requesting the Union Trust Company to communicate with the plaintiff, if the coupons were presented for payment) paid these coupons without making any inquiry as to the title of the holders.

Some time after the above notice by the plaintiff to the defendant of his loss, he informed the defendant that, by negotiation with the persons who had stolen his bonds, he had recovered twenty-five of the lost bonds, and he subsequently informed the defendant that he had held further negotiations for the restoration of the residue of the bonds, in which negotiation he had offered to pay the sum of \$6000 for such restoration, but that the sum of \$9000 or \$10,000 was demanded of him, which he

had declined to pay, and he was now sorry that he had so declined. Subsequently, and about the time of the date thereof, the plaintiff sent the defendant a postal card, headed "Stolen bonds of H. R. Hinckley, Northampton, Mass.," under which were the words "Union Pacific S. F. 8%," and the numbers of nineteen bonds, among which were the numbers 5135 and 5136; and the following signed by the plaintiff, with the date January 7, 1878: "The above are the balance of a lot of \$42,000 — Nos. 5113 to 5554 inclusive — original bonds never put on the market, which were stolen from the Northampton National Bank, of Northampton, Mass., on the night of Jan. 26 and 27, 1876. The other \$25,000 have been recovered. All parties are cautioned against negotiating the above numbers."

Before the commencement of this action, the defendant gave notice to the plaintiff of the date and the name of the persons to whom the defendant paid the coupon declared on in the second count of the declaration.

A circular of the treasury department of the United States and a statement by the treasurer of the defendant and of the secretary of the Union Trust Company, the trustee named in the mortgage deed given to secure the bonds in question, were to form part of the agreed facts, if admissible in evidence, and not otherwise.

The circular of the treasury department was as follows "Treasury Department, April 27, 1867. In consequence of the increasing trouble, wholly without practical benefit, arising from notices which are constantly received at the department respecting the loss of coupon bonds which are payable to bearer, and of treasury-notes issued and remaining in blank at the time of loss, it becomes necessary to give this public notice, that the government cannot protect, and will not undertake to protect, the owners of such bonds and notes against the consequences of their own fault or misfortune. Hereafter, all bonds, notes and coupons, payable to bearer, and treasury-notes issued and remaining in blank, will be paid to the party presenting them, in pursuance of the regulations of the department, in the course of regular business; and no attention will be paid to caveats which may be filed for the purpose of preventing such payment. H McCulloch, Secretary of the Treasury."

The statement of the treasurer of the defendant and of the secretary of the Union Trust Company was as follows: "It happens once a week, on an average, that a person will present for payment the coupons of a bond or of several bonds, which coupons are overdue for one or more years, with or without those of intervening dates. Coupons presented after maturity are often presented at dates concurrent with the payment of coupons from other classes of the company's bonds, which last are just due or just past due. The company pays coupons from first mortgage bonds, \$27,231,000; land grant bonds, \$6,670,000; sinking fund bonds, \$12,455,000; Omaha Bridge bonds, \$2,104,000." Annexed to this statement were schedules in support of the statement that coupons to a large amount were not presented for payment until long overdue.

If these facts showed a defence to the claims set forth in the first and second counts, judgment was to be entered for the defendant on both counts. If the facts showed a defence to one count, but not to the other, judgment was to be entered for the defendant on that count, and for the plaintiff on the other; otherwise, judgment for the plaintiff on both counts. Before judgment for the plaintiff was entered on the first count, he was to execute to the defendant a sufficient bond of indemnity in such form as the court should direct. The judgment to be entered for the plaintiff, if any, was on each count to be \$40, with interest from April 18, 1879.

J. C. Gray, Jr. & W. C. Loring, (J. C. Ropes with them,) for the plaintiff.

S. Bartlett, for the defendant.

LORD, J. There is no doubt that the coupons, of which copies are given in the agreed statement of facts, were properly declared on as promissory notes payable to bearer. *Spooner v. Holmes*, 102 Mass. 503, 507. It is well settled in this Commonwealth that, when such a negotiable promissory note is stolen from the holder before it is due, the amount of it may be recovered from the maker in an action at law, on filing a sufficient bond for his indemnification. *Fales v. Russell*, 16 Pick. 315. The plaintiff is therefore entitled to recover the amount of the coupon declared on in the first count of his declaration, on filing before judgment a sufficient bond of indemnity. The condition of such

bond should be of such tenor as to save harmless the defendant against all lawful claims by any other person on account of the coupon in question, and against all costs and expenses by reason of such claims.

The question which we are called upon by the second count to decide is whether, when a negotiable promissory note payable to bearer has been lost or stolen without the fault or neglect of the owner, and is presented for payment when long overdue, the party liable to pay it is bound by previous notice of the loss to inquire into the title of the *de facto* holder before payment.

It has been argued for the defence that the duty of the promisor in case of the loss of a coupon is a gratuitous duty, analogous to the liability of a gratuitous bailee. We cannot take such a view of this duty. It is true, as the counsel for the defendant maintains, that the liability does not arise from the contract, but from the law outside of the contract; but whatever that liability may be, it is part of the law which governs the issue and circulation of negotiable instruments, to which the maker of such instrument subjects himself by the very act of making, and from which he derives the advantage which the negotiability of his promise affords him.

It is conceded that the text-books declare generally that liability ensues from the payment of a lost negotiable instrument after notice of loss, and that no such payment will operate as a discharge against the loser, unless the party presenting the instrument for payment is required before payment to establish a clear title thereto. Chit. Bills, (11th ed.) 188, 278, 279; Bayley on Bills, (2 Am. ed.) 112, 113. Byles on Bills, (13th ed.) 223, 224, 379; 2 Daniel on Negotiable Instruments, (2d ed.) § 1280; Edwards on Bills & Notes, 538; 2 Parsons on Notes & Bills, (2d ed.) 81, 212, 213.

It is alleged for the defence, as a circumstance calculated greatly to weaken the force of this *consensus* of text-writers, that no case has been found in which recovery has actually been had, or even sought, based upon such liability. But it must be remembered that, upon a principle of law so important as this, the absence of decisions may be because of the long and unquestioning acquiescence in the rule; and certainly it is more reasonable thus to construe it than to attribute it to any doubtfulness or

uncertainty as to the rule itself. Such doubt or uncertainty would almost necessarily lead to a judicial decision. It has unquestionably been the practice of the Bank of England for more than a century to regard notices of the loss of their notes, and to delay payment for the purpose of making inquiry into the title of the *de facto* holder. See *Solomons v. Bank of England*, 13 East, 135, note; *De la Chaumette v. Bank of England*, 2 B. & Ad. 385; *Raphael v. Bank of England*, 17 C. B. 161. In *Solomons v. Bank of England*, the counsel for the plaintiff did not even contend that the maker of ordinary negotiable paper was not bound by notice of loss, but endeavored to establish a distinction (which was not upheld) in favor of bank-bills, saying, "If once the bank were permitted to withhold payment upon the same grounds as would warrant it in the case of bills of exchange, the confidence of foreigners would be very much shaken, and the circulation of these notes greatly diminished."

In *Miller v. Race*, 1 Burr. 452, Lord Mansfield makes the distinction between "securities or documents for debts" and bank-notes, that the latter, by commercial and business use, had become currency or money, universally regarded as such, in England and in other countries, and so were distinguishable from all other evidences of debt. Without defining accurately the rights of owners of commodities, or of choses in action, or of negotiable securities other than bank-notes, his decision is based upon the ground that bank-notes are money, and yet he holds that, even regarding them as money, "It may be both reasonable and customary to stay the payment till inquiry can be made whether the bearer of the note came by it fairly or not."

In *Wheeler v. Guild*, 20 Pick. 545, Chief Justice Shaw reviews the authorities on the subject of transfer and payment of lost negotiable instruments, and says: "Most of the same principles and reasons apply alike to transfers and to payments. We think the rules deducible from the cases are these: where a party takes a bill transferable by delivery, not overdue nor otherwise apparently dishonored, for valuable consideration, in the usual course of business, and without notice, actual or constructive, that the holder came by it unlawfully or without title, and has no just right to collect and receive it, the party taking it shall hold it as a valid security, notwithstanding that it has been lost by the

true owner, or stolen from him, or taken by the holder as a mere agent to keep, or for other special purpose, without any authority to collect or transfer it, otherwise he shall not be deemed to have a good title to hold and enforce payment of it, or to withhold the bill itself or the proceeds of it from the party justly entitled. *Bleaden v. Charles*, 7 Bing. 246. The same rule applies to payments; if a bill be paid at maturity, in full, by the acceptor, or other party liable, to a person having a legal title in himself by indorsement, and having the custody and possession of the bill ready to surrender, and the party paying has no notice of any defect of title or authority to receive, the payment will be good." There is here the strongest implication of the rule that, if the party paying has notice of any defect of title or authority to receive, the payment will not be good; a rule which is in accordance with other decisions of this court.

It becomes then of great importance to determine what notice is sufficient to charge the party liable to pay with a duty of inquiry into the title of the *de facto* holder. It is clear that such notice need not be accompanied by an offer of indemnity, since the filing of a bond of indemnity merely takes the place of the filing in court of the note or other security, and such filing, as was very clearly stated by Chief Justice Shaw in *Fales v. Russell*, *ubi supra*, is not a condition precedent of the right to recover, but simply an acquittance to be made on obtaining judgment. As to the time of the notice, there can be no question that, if at the very moment of payment the payer were reminded that the note which he was about to pay had been lost or stolen, it would be his duty to delay payment till the *de facto* holder had established a title to the instrument. The question before us is whether notice previously given of the loss of a negotiable instrument distinguishable by number or other ear-mark is sufficient to fix upon the party liable to pay a duty of inquiry, and of refusal to pay to a holder who cannot substantiate his title. We think that such previous notice is sufficient. Whether it is sufficient to fix such duty of inquiry upon a mere transferee it is not necessary for us to inquire, because the party liable to pay a negotiable instrument bears a relation and owes duties to the holder and loser different from those of the transferee; though it has certainly never been decided in this Commonwealth that

such previous notice is insufficient to fix a duty of inquiry even upon a mere transferee; and the doctrine laid down in *Fales v. Russell* tends strongly the other way. For a party engaged in mercantile pursuits to keep a list of notes signed by himself which he has been notified have been lost or stolen, is neither impracticable nor burdensome, and is no more a hardship than any other precaution which the law merchant imposes upon those who make use of the benefits of negotiable paper, for the discouragement of fraud and the protection of the public. And the fact that an individual or a corporation does business on a very large scale is far from being a reason why such individual or corporation should be allowed to disregard any of the obligations laid upon those who issue only small amounts of negotiable paper. Ordinarily opportunities for fraud upon the public will increase with the increase of the business of a great corporation, and it is the duty of such a corporation to provide proportionally greater means of guarding against such fraud. If it be necessary to engage special clerks, or to devote extra time to applying the precautions imposed by the law merchant, it is no hardship, but only the natural and reasonable increase of a duty proportionate to the magnitude of the obligations of such a corporation. The statement of the treasurer of the defendant and of the secretary of the Union Trust Company has not shown that it was either impracticable or unreasonably difficult to provide for acting upon notice of lost or stolen securities; for any other purpose these statements are wholly incompetent, as is the circular letter of the United States treasury department, offered by the defendant.

There is another circumstance in this case which tends to fix more clearly upon the defendant the duty of inquiry, and that is that the coupon was long overdue. The maker of a coupon cannot be exempt from the liabilities which attach to all negotiable instruments when overdue. It is an elementary principle of commercial law that negotiable paper overdue carries with it, on its very face, notice of defective title sufficient to put the transferee on inquiry. *Gold v. Eddy*, 1 Mass. 1. *Vermilye v. Adams Express Co.* 21 Wall. 138. Although the application of the simple rule to payment would be practically of rare occurrence, since notice of the loss or stealing would be given in almost every

case, there is no reason why a distinction should be made in this respect between transfer and payment, and no such distinction is consistent with the language of Chief Justice Shaw in *Wheeler v. Guild*, before cited. After maturity, a coupon, like any other negotiable security, loses the protection of the law merchant, and becomes a mere chose in action. There is no presumption of law that the party presenting such a chose in action to the party liable to pay is the true holder. The fact that the defendant has deemed it convenient to conduct its business without regard to the application of the law in this respect, does not free it from responsibility. As was remarked by Mr. Justice Miller in *Vermilye v. Adams Express Co. ubi supra*, speaking of a usage to deal in government securities when overdue as if they were still current, "Bankers, brokers, and others cannot, as was attempted in this case, establish by proof a usage or custom in dealing in such paper, which, in their own interest, contravenes the established commercial law. If they have been in the habit of disregarding that law, this does not relieve them from the consequences, nor establish a different law."

The fact that the defendant notified the plaintiff, before this suit was brought, of the name of the person to whom and of the date at which this coupon was paid, does not affect the plaintiff's right to recover in this action. The only payment which can be a discharge to the party paying is a payment to a *bona fide* holder, whose title was acquired before maturity, for value, and without notice. It may often happen that upon inquiry the title of the *de facto* holder will appear so plainly that the party paying will take very little risk in making the payment; but the payment of a lost negotiable instrument, after notice, overdue, and without inquiry, is a payment wholly at the payer's own risk.

We think, therefore, that judgment should be entered for the plaintiff on both counts of his declaration, upon his filing, as to the first count, a sufficient bond of indemnity.

Judgment for the plaintiff accordingly.

HENRY F. HAYES *vs.* SAMUEL NASH.

Suffolk. March 10. — June 30, 1880. ENDICOTT & SOULE, JJ., absent.

An action against an officer for a conversion of the plaintiff's property, by attaching it on a writ against a third person, is barred by a discharge in bankruptcy obtained subsequently to the attachment, although the effect is to exonerate the sureties on his official bond from liability for his misfeasance.

TORT against a constable of the city of Boston, for the conversion of personal property. Trial in the Superior Court, before *Putnam, J.*, who allowed a bill of exceptions in substance as follows:

After the commencement of the suit, the defendant filed his petition in bankruptcy, and subsequently obtained his discharge, which is filed in the case in bar of further proceedings. The plaintiff thereupon filed the following replication, and offered to prove the facts alleged in it: "And now comes the plaintiff and replies that this debt or claim is not discharged by bankruptcy; that the property alleged in the declaration to be converted by the defendant, was attached by him on two writs in his capacity of constable of the city of Boston; that both writs were duly returned to court, and one action was disposed of by the entry of neither party, and in the other a verdict has been obtained for the defendant; that the property attached by the defendant in those suits is the property of the plaintiff in the present suit, and that the present plaintiff was not a party to either of the other suits, yet the officer has not released said property, but holds it as against this plaintiff, who is the rightful owner. Wherefore, the plaintiff says this case is not affected by the defendant's discharge in bankruptcy, the debt being created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in a fiduciary character."

The defendant thereupon requested the court to rule, upon this offer of proof, that the facts, if proved, would not constitute a claim which was exempted from the operation of the discharge. The judge so ruled, and ordered a verdict for the defendant; and the plaintiff alleged exceptions.

B. F. Briggs, for the plaintiff.

C. T. Gallagher, for the defendant.

MORTON, J. The defendant, as a constable of the city of Boston, attached the goods of the plaintiff upon writs against a third person. This was a conversion of the goods, which made the defendant liable to an action of tort in the nature of trover. He sets up in defence a discharge in bankruptcy subsequently obtained, and the question presented by the bill of exceptions is whether such discharge is a bar to the plaintiff's claim.

There is no doubt that ordinarily a discharge in bankruptcy is a bar to all claims for or on account of any goods or chattels wrongfully taken or converted by the bankrupt. U. S. Rev. Sts. §§ 5067, 5114, 5119. *Burnham v. Noyes*, 125 Mass. 85. *Brenner v. Duard*, 126 Mass. 400.

But the plaintiff contends that the case falls within the clause of the bankrupt law which provides that "no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy."

There is no allegation or pretence that the defendant obtained possession of the goods by fraud; and it cannot be contended that he was acting in any fiduciary relation to the plaintiff. *Cronan v. Cotting*, 104 Mass. 245. *Woodward v. Towne*, 127 Mass. 41.

Nor can it be held that the debt of the defendant was created by his defalcation as a public officer. A defalcation by a public officer implies some breach of trust, such as the failure to account for money or property entrusted to him, and cannot fairly be extended to cover all acts of misfeasance. The act of the defendant in taking the plaintiff's property on a writ against another person was a misfeasance for which he and the sureties on his bond would be liable. *Tracy v. Warren*, 104 Mass. 376. But it was not a defalcation which prevents his discharge in bankruptcy from being a bar.

The plaintiff contends that the discharge ought not to operate as a bar, because the effect would be to exonerate the sureties upon the official bond of the defendant from liability for his misfeasance. The St. of 1814, c. 165, which is still in force, provides that no suit shall be brought by any person injured by the misfeasance of a constable of Boston upon his bond, until such person shall have recovered judgment against the constable or his executors or administrators. *Calder v. Haynes*, 7 Allen,

387. *Tracy v. Warren*, 104 Mass. 376. And the plaintiff argues that the provision of the bankrupt law that no discharge "shall release, discharge or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, indorser, surety, or otherwise," applies to this case. A similar question arose in *Carpenter v. Turrell*, 100 Mass. 450. That was a suit against bankrupts, in which an attachment had been made more than four months before the commencement of the proceedings in bankruptcy; the defendants had dissolved the attachment by giving a bond under the general statutes, and the plaintiffs sought to obtain a special judgment so as to enable them to avail themselves of the bond. But it was held that the discharge in bankruptcy was a bar to the further prosecution of the suit, and that such special judgment could not be entered. The judgment and the reasoning in that case are decisive of the case at bar. The defendant is entitled to the benefit of the express provisions of the bankrupt law, which make his discharge a bar to the plaintiff's claim, although the incidental effect is to exonerate the sureties on his official bond from a future collateral liability. *Exceptions overruled.*

THOMAS SHERWIN vs. THOMAS WIGGLESWORTH & another.

Suffolk. March 10. — June 30, 1880. ENDICOTT & SOULE, JJ., absent.

Although by the provisions of the U. S. St. of March 3, 1878, and of the St. of 1873, c. 189, the title in land taken by the United States for a post-office in Boston did not vest in the United States until the assessment and payment of damages thereby occasioned, yet the title taken was that which existed when the petition for the valuation of the land was filed by the agent of the government; and the owner is not chargeable with taxes and betterments assessed upon the land while the proceedings upon such petition were pending.

CONTRACT by the collector of the city of Boston against the executors of the will of Edward Wigglesworth, to recover taxes and betterments assessed upon several parcels of land in Boston formerly belonging to the defendant's testator. Writ dated November 8, 1878. The case was submitted to this court on agreed facts, in substance as follows:

Edward Wigglesworth was the owner of all the land in question on April 15, 1873, and thereafter until it was taken by the United States for a post-office, in pursuance of the U. S. St. of March 3, 1873, and of the St. of 1873, c. 189. On April 16, 1873, a petition was filed, under and in accordance with these acts, by the agent of the United States, for the condemnation of the estate of Wigglesworth in said land. A verdict was rendered on this petition, and was accepted and recorded by the court on April 6, 1875; and final judgment was rendered thereon on August 16, 1876, and on the same day Wigglesworth was paid the amount of the judgment.

Taxes were assessed on this land by the city of Boston on May 1, 1875, and on May 1, 1876; and in February 1875, assessments were made for betterments in respect of the widening of certain streets, made under orders approved April 18, 1873.

If the plaintiff was entitled to recover, judgment was to be entered for him for a sum stated; otherwise, for the defendants.

E. P. Nettleton, for the plaintiff.

O. W. Holmes, Jr., for the defendants.

GRAY, C. J. By the provisions of the act of Congress of March 3, 1873, and of the statute of the Commonwealth of 1873, c. 189, the title in land taken for the post-office in Boston does not vest in the United States until the assessment and payment of the damages thereby occasioned to the owners of the land. But the title which is purchased by and vests in the United States is the title as it existed when the petition for the valuation of the land was filed by the agent of the government. The time necessary to complete the judicial proceedings does not change the subject or the measure of compensation, or the parties who are entitled to it. In theory of law, although the compensation cannot be paid until it has been estimated, nor the title pass until the compensation is paid, yet both the compensation paid and the title acquired have relation back to the inception of the proceedings for the condemnation of the land to the public use. It has already been adjudged that the measure of the damages to be awarded to the owners is the value of the land at that date, and interest thereon. *Burt v. Merchants' Ins. Co.* 115 Mass. 1. See also *Parks v. Boston*, 15 Pick. 198, 208; *Old Colony Railroad v. Miller*, 125 Mass. 1. And it would be

most unjust to charge the owners of the land with betterments or other taxes imposed after it has been designated and set apart for the public use, and while they cannot enjoy, nor improve it, nor obtain compensation for any increase in its value.

Judgment for the defendants.



MARY B. BROWNE *vs.* JOHN W. McDONALD, executor.

Suffolk. March 12. — June 30, 1880. ENDICOTT & SOULE, J.J., absent.

A contract, the duration of which is not fixed, to pay a reasonable compensation for the board, tuition and clothing of a person whom the promisor is not bound to support, is terminated by the death of the promisor; and an action cannot be maintained against his executor for anything subsequently furnished, although the executor has not given notice of the death.

CONTRACT on an account annexed, against the executor of the will of Bernard O'Reilly, for board, tuition, clothing and other necessities furnished to the testator's niece, Margaret O'Reilly, from April 13, 1875, to April 13, 1877. Trial in the Superior Court, without a jury, before *Brigham*, C. J., who found for the plaintiff, and ordered judgment for the full amount claimed; and the defendant alleged exceptions. The facts appear in the opinion.

C. F. Donnelly, for the defendant.

W. S. Stearns, for the plaintiff.

MORTON, J. The only contract between the plaintiff and the defendant's testator, which the evidence tends to show, is one which is revocable by either party at any time. The latter placed his niece in the school of the plaintiff and agreed to pay a reasonable compensation for her board, teaching, and such articles of clothing as should be furnished to her. There was no stipulation that she should remain for any definite time, and the testator might have removed her at any time and thus have terminated the contract. It was a contract which was to continue at the will of either party, and either might terminate it at any time upon reasonable notice. We are of opinion that the death

of the testator terminated this contract; and therefore that the defendant was entitled to the ruling which he requested, that the plaintiff was not entitled to recover for any items of her account furnished after she had notice of the death. The estate is held for all liabilities existing at the death of the testator. But it is not held for a liability created after his death, under a contract which was to continue in operation at his will, and which makes no provision for a continued operation after his death.

The fact that the executor did not give the plaintiff formal notice of the death is immaterial. The testator was not bound to support his niece. His doing so was an act of charity. The executor had no right to bind the estate by an agreement to continue this charity, and his neglect to give notice of the death could not indirectly bind the estate to an obligation which he could not directly impose upon it. *Exceptions sustained.*



WILLIAM H. TALBOT & others vs. NATIONAL BANK OF THE
COMMONWEALTH.

Suffolk. March 16. — June 30, 1880. AMES & LORD, JJ., absent.

If a promissory note specifies no place of payment, a presentment of it for payment at the former place of business of the maker, without any inquiry as to his place of residence, is not a good presentment to charge an indorser.

If an indorser of a promissory note, relying upon a notice received from a notary public that the note has been dishonored, and, being called upon to pay the note by a subsequent indorsee, pays it to him, when in fact a proper demand has not been made upon the maker, such payment is made under a mistake of fact, and an action for money had and received will lie for the amount so paid.

In an action for money had and received, interest is to be computed only from the date of the writ, in the absence of evidence of a demand for the money before bringing suit.

CONTRACT for money had and received. Writ dated June 11, 1879. The case was submitted to the Superior Court on agreed facts, in substance as follows:

On September 15, 1877, the plaintiffs were the owners of a promissory note for \$642.79, dated Kalamazoo, Michigan, Sep-

tember 10, 1877, payable five months after date to the order of Patrick Reynolds, signed by John J. Mullen, and indorsed by Reynolds and by the plaintiffs. On the above day, the plaintiffs offered the note, with their indorsement, to the defendant bank, of which they were customers, for discount, in the ordinary course of business; and the same was discounted by the defendant, and the plaintiffs received the amount of the note less the rate of discount agreed on. On the day the note matured, the maker occupied a house in Kalamazoo and had had a place of business there, but did not have any there on that day. The defendant, before the maturity of the note, sent it to a bank in Kalamazoo for collection, and, not having been paid at maturity, the note was protested by a notary, who stated in his protest that he presented the note at a certain bank and "at the store lately occupied by John J. Mullen, and demanded payment thereof, which was refused;" and that due notice "that such note had been thus presented for payment, and that payment had been thus demanded and refused," and that the holder of the note would look to the indorser for payment, was sent by mail to the indorsers.

The note, after protest, was returned to the defendant, with the protest annexed; and the defendant called upon the plaintiffs as indorsers to pay the same. The plaintiffs, believing that a proper demand had been made on the maker, and that the note had been duly protested, paid the defendant the amount of the note, and took away the note with the protest annexed, the same being given up to them by the defendant simultaneously with the payment of the money. The plaintiffs did not know the contents of the protest, but, relying on the notice of dishonor sent them and the claim of the defendant, believed that the protest was good, and that they were bound to pay the note to the defendant. They then brought suit against the first indorser, Reynolds, at Kalamazoo, and, at the trial of that action, the above facts as to the protest, then first known to the plaintiffs, appearing, the court ruled that the note had not been properly protested, and that a verdict for the defendant would be ordered. Thereupon the plaintiffs became nonsuit; and, after a tender of the note to the defendant, brought this action.

The Superior Court ordered judgment for the plaintiffs for \$713.48; and the defendant appealed to this court.

J. R. Bullard, for the plaintiffs.

C. H. Drew, for the defendant. 1. The amount of the note was not paid to the defendant under such circumstances as to entitle the plaintiffs to recover it back. They had all the means of knowledge in relation to the demand and notice in their power. The notarial protest in which the facts were fully set forth was put into their hands simultaneously with the paying of the money to the defendant; and the notice sent to them by the notary showed how the demand had been made. The case therefore falls within the rule laid down in *Warren Bank v. Parker*, 8 Gray, 221, and differs from *Garland v. Salem Bank*, 9 Mass. 408. See also *Cromer v. Platt*, 37 Mich. 132.

2. The plaintiffs, if entitled to recover, are entitled to interest only from the date of their writ. *Ordway v. Coleord*, 14 Allen, 59. *Garland v. Salem Bank*, 9 Mass. 408.

SOULE, J. When the note matured, the maker occupied a house in Kalamazoo. He had no place of business, and the note did not specify any place of payment. It was payable, therefore, at his house. It was not presented there for payment, nor to the maker elsewhere. The presentment at the place in Kalamazoo which had formerly been occupied as a place of business by the maker, without any inquiry as to his place of residence, was not a good presentment, and did not show such diligent search for the maker, and failure to find him, as would excuse a want of presentment of the note and demand of payment. *Garland v. Salem Bank*, 9 Mass. 408. *Granite Bank v. Ayers*, 16 Pick. 392. *Porter v. Judson*, 1 Gray, 175. The note, therefore, was not dishonored, and the plaintiffs were discharged from all liability as indorsers. They paid it under the supposition that it had been dishonored, and that their liability had been fixed. They had received notice that it had been dishonored, signed by the notary, and forwarded to them by the defendant bank. They had the right to rely on this notice, thus forwarded, as true, and the payment made by them in consequence was a payment made under a mistake of fact on their part, and they are entitled to recover the amount paid in this action. *Garland v. Salem Bank*, *ubi supra*.

Interest on the amount paid by the plaintiffs is recoverable only as damages for the wrongful detention of the money by the defendant. Nothing in the facts agreed shows that the plaintiffs made any demand for the money before bringing suit. Under these circumstances, interest should be computed from the date of the writ only. *Ordway v. Colcord*, 14 Allen, 59.

Judgment for the plaintiffs accordingly.



JOHN T. CHAMBERLAIN & others *vs.* CHARLES S. LINCOLN
& others.

Suffolk. March 17. — June 30, 1880. AMES & LORD, JJ., absent.

The rights of different persons claiming to represent a subordinate lodge of the Order of Good Templars of Massachusetts are to be determined by the constitution of the Grand Lodge, and, although a subordinate lodge has done acts which render it liable to have its charter declared forfeited by the Grand Lodge, yet, until such forfeiture has been declared, it is entitled to possession of the property of the lodge; and a bill in equity cannot be maintained against its members to recover possession of such property by persons claiming to be recognized by the Grand Lodge as the subordinate lodge, until they have exhausted the remedies prescribed in the constitution of the Grand Lodge.

BILL IN EQUITY by three persons claiming to be officers, trustees, and members of Royal Arch Lodge No. 17 of the Independent Order of Good Templars, in behalf of themselves and the other members of said lodge, against three persons alleged to be the officers of an association wrongfully claiming the name and title of the Royal Arch Lodge, to obtain the records, books, charter, ritual and other property of said lodge, and to restrain the defendants from using the name of the lodge and from spending a certain sum of money belonging to the lodge. A demurrer to the bill was sustained, and the bill dismissed, with costs; and the plaintiffs appealed to the full court. The material allegations of the bill and the provisions of the constitution of the Grand Lodge appear in the opinion.

A. E. Pillsbury, for the defendants.

A. Russ, for the plaintiffs.

ENDICOTT, J. We are of opinion that the plaintiffs in their bill show no ground for the relief prayed for.

The Grand Lodge of the Order of Good Templars of Massachusetts is alleged to be a corporation, duly established by law, for the purpose of promoting the cause of temperance. Under the constitution of this corporation, which is made part of the bill, authority is given to issue charters to subordinate lodges, upon the application of ten or more persons in good standing, and to suspend or revoke the same, and to demand the surrender of the charter and books of a lodge from any person in whose custody and possession they are. It does not appear that by such surrender the charter is necessarily suspended, revoked or forfeited. On the contrary, it is provided that it may be returned at any time within a year on the petition of ten members in good standing at the time of the surrender. Among the duties imposed upon the subordinate lodges thus created is the payment quarterly of a per capita tax to the Grand Lodge, and, failing to do this, or to hold meetings or make returns for twelve months, the charter is thereby forfeited and may be reclaimed by the council of the Grand Lodge. Any member of a subordinate lodge has the right of appeal to the officers of the Grand Lodge, if dissatisfied with any decision of the lodge. All appeals must be in writing, and due notice given of the same; and the Grand Lodge is empowered to receive and decide them upon hearing, and to determine all questions of law and usage.

It is clear that the rights of the members of the subordinate lodges must be determined by the provisions of these instruments. *Grosvenor v. United Society of Believers*, 118 Mass. 78.

Both parties in this case claim to represent the subordinate lodge known by the name of Royal Arch Lodge No. 17. At one of its regular meetings, on April 29, 1879, the members voted not to pay the per capita tax, and to sever their connection with the Grand Lodge. At a subsequent meeting on May 6, the majority refusing to rescind the former vote, the persons constituting the minority retired from the meeting and elected officers of the lodge, who, the bill alleges, were installed in office by the Grand Worthy Chief Templar as provided in the constitution of the Grand Lodge, and that this action was formally approved

by the authorities of the Grand Lodge. But it does not appear by the constitution that it is one of the duties of the Grand Worthy Chief Templar to install the officers of subordinate lodges. This power is given to and imposed upon lodge deputies in express terms.

The plaintiffs, who were thus elected officers, in behalf of their associates, thereupon demanded of the defendants the delivery to them of the books, records, charter, and other property of the lodge in their custody and possession. The defendants refused to comply with this demand, and the plaintiffs on June 2 following filed this bill, praying that they be ordered to deliver up all said property, and be perpetually enjoined from using the name or acting as officers of the lodge.

But we are not called upon to determine between these parties, each claiming to be Royal Arch Lodge No. 17 and subject to the control and supervision of the Grand Lodge, to which the charter and other property of the subordinate lodge belong. The instruments under which this lodge is organized afford ample means of determining that question, by the action of the Grand Lodge upon its own motion, or upon appeal by the parties aggrieved. They may revoke the charter or suspend it, or demand its surrender and the surrender of the books from the defendants. We cannot say that they would not be justified in taking either of these courses, in view of the action of the defendants, but they have not seen fit to take either course. While the charter remains in force and is held by the defendants, and no formal action has been taken to deprive them of it, the defendants would seem also to have the right to hold the other property of which they are in possession under and by virtue of their charter. The failure to pay the tax or to make returns does not work a forfeiture of the charter unless continued for twelve months. Nor does the vote passed by the lodge not to pay the tax and to sever its connection with the Grand Lodge, in itself and without action on the part of the Grand Lodge, work a forfeiture. Nor can the approval by the Grand Lodge of the installation of the plaintiffs as officers by the Grand Worthy Chief Templar, be taken as an implied revocation of the charter, for the rules prescribe how and in what manner a charter may be reclaimed or taken from a subordinate lodge.

The plaintiffs and their associates, if aggrieved by the action of the defendants, could have appealed to the Grand Lodge. That tribunal, after hearing had, could have demanded the surrender of the charter from the defendants, and returned it to the plaintiffs on their petition, if members of the lodge in good standing at the time of the surrender. Instead of taking this course, they at once seek relief by this bill; and we are of opinion that the demurrer was properly sustained, and the bill dismissed.

Decree affirmed, with costs.

COMMONWEALTH, by Commissioner of Savings Banks, vs.
READING SAVINGS BANK.

Suffolk. March 18. — June 30, 1880. AMES & LORD, JJ., absent.

Under the Gen. Sts. c. 57, §§ 137, 138, providing that the trustees of a savings bank shall be chosen annually, and shall appoint a treasurer who shall hold office during their pleasure, the office of the treasurer is not an annual one; and a bond given by him for the faithful performance of the duties of his office "while he acts as treasurer" is a continuing bond.

PETITION IN EQUITY, filed June 4, 1879, by Paulina Gerry, alleging that the petitioner was the owner of a certain promissory note for \$5000, given by Nathan P. Pratt to Ira Gerry, that she was also the owner of a mortgage and note assigned to Gerry by Pratt as collateral security for the payment of the first-named note; that no part of said note for \$5000 has been paid; that Pratt was late the treasurer of the respondent bank; that he was elected to that office on July 23, 1869, and thereupon gave a bond to the bank conditioned to secure the faithful performance of the duties of the office, "while and so long as he acts as treasurer of said company;" that this bond was secured by a mortgage on most of the land included in the mortgage assigned to Gerry by Pratt, who at that time was the owner in fee of the land; that the mortgage given to the bank was executed and recorded prior to the mortgage assigned to Gerry; that Pratt was never elected to the office of treasurer but once, namely, on July 23, 1869; that said office was an annual one.

conditioned on the pleasure of the trustees of the bank; that the bank was now insolvent and in the hands of receivers; that the receivers had taken possession of said land, had brought suit upon the bond, and were about to foreclose the mortgage to the bank for an alleged breach of the condition of the bond; that the mortgage to the bank should be discharged, Pratt having fulfilled the conditions of the bond during the year for which he was chosen, after which time the bond became inoperative and of no effect; and that the petitioner was unable to foreclose her mortgage and obtain a good title to the land until the first mortgage should be discharged. The prayer of the petition was that the receivers might be ordered to discharge the first mortgage, and not to proceed and obtain judgment on the bond until it should be decreed whether the petitioner's prayer to have the mortgage discharged should be granted. The receivers demurred to the petition.

The demurrer was sustained, and the petition dismissed. The petitioner appealed to the full court.

A. B. Ellis, for the petitioner.

C. P. Judd, for the receivers.

COLT, J. The treasurer of the Reading Savings Bank, upon his appointment in 1869, gave bond conditioned to secure the faithful performance of all the duties of his office "while and so long as he acts as treasurer of said company." This bond was secured by a mortgage of his real estate, which the petitioner as second mortgagee asks to have discharged, contending that there was no breach of the condition of the treasurer's bond, because the office to which he was chosen expired at the end of the first year, and the conditions of the bond during that year were all fulfilled.

The statute provides that the treasurer of a savings bank shall be appointed by the trustees, shall give bond, and shall hold his office during their pleasure; and that all other officers shall be chosen at the annual meeting of such corporations. Gen. Sts. c. 57, §§ 137, 138.

The bond in this case is for the good behavior of the treasurer for an indefinite period; its obligation ceases only when he ceases to act as treasurer. The terms of the condition above quoted are not limited by provisions of the statute, by the recitals in

the bond, or by the records or votes of the corporation. They comply accurately with the requirements of the statute. It was the plain intention of the Legislature to make the office of treasurer to continue during the pleasure of the board of trustees, and not be subject to annual elections. It would be an unwarranted construction of the statute to hold otherwise, simply on the ground that the tenure of the office depended on the pleasure of successive boards of trustees who are annually elected.

The case of *Dedham Bank v. Chickering*, 3 Pick. 335, is very much in point. In that case a person was elected cashier of a bank when it was first organized, and continued to act as cashier for several years thereafter, when he absconded with the books, papers and moneys of the bank. He had given bond with sureties for the faithful performance of his duties "so long as he should continue in his said office." It was decided that the bond covered this last breach of duty, it not appearing, either in the bond itself, or in the charter, records or regulations of the bank, that the office of cashier was an annual one. See also *Chelmsford Co. v. Demarest*, 7 Gray, 1; *Amherst Bank v. Root*, 2 Met. 523; *Cambridge v. Fifield*, 126 Mass. 428.

The petitioner fails to set forth in her petition any ground for the relief she asks, and the entry must be *Decree affirmed.*



JOHN W. MCKIM, Judge of Probate, vs. EMILY HARWOOD & others.

Suffolk. March 19. — June 30, 1880. AMES & LORD, JJ., absent.

A testator, by the first clause of his will, of which he appointed his wife executrix, gave to her all his personal property, and, by the second clause, he gave to her all the income of his real estate during her lifetime, "and, at her decease, the property remaining to be divided equally" among his children. *Held*, that the widow took the personal property absolutely as legatee, and, there being no creditors of the estate, she had the right to pay and appropriate it to herself. The failure of an executor, who, as sole legatee under the will, there being no creditors, is the only person interested in the disposition of the estate, to file an inventory and to render an account within the time prescribed by law, is a technical breach of his bond, which is cured by filing the inventory and rendering the account before suit on the bond.

CONTRACT against the principal and sureties upon a probate bond given by Emily Harwood as executrix of the will of her husband, John Harwood. She was defaulted, and the action was defended by the sureties. Hearing before *Endicott, J.*, who found that there was a breach of the bond, ordered judgment for the plaintiff, and sent the case to an assessor to assess the damages; and the defendants alleged exceptions to the above finding. The assessor made and returned his report to the court, and, at the hearing, *Lord, J.* affirmed the findings of the assessor in matters of fact, and ruled as matter of law that the plaintiff was entitled to nominal damages only; and the plaintiff alleged exceptions. The facts appear in the opinion.

B. F. Butler & C. Cobb, for the plaintiff.

N. Morse & W. F. Merritt, for one of the sureties.

C. Allen, for the other surety.

MORTON, J. The first question is whether there has been any breach of the bond. The material parts of the will of John Harwood are as follows:

"First. I give and bequeath to my beloved wife, Emily Harwood, all my personal estate, wearing apparel, household furniture, and also all my personal property, such as money at interest, notes, bank stocks, money in the savings, and all that I may hereafter acquire.

"Second. I also give and devise to my wife, Emily Harwood, all the income of my real estate during her lifetime, for the purpose of enabling her to maintain a home for herself and my children during her lifetime; and at her decease the property remaining to be divided equally amongst children, Henry T. Harwood, Mary E. Harwood and Emily Harwood, should they survive their parents; if they should not, to be divided amongst their legal heirs. I also appoint my beloved wife, Emily Harwood, to be my sole executrix of this my last will and testament."

By the first clause, the testator, in clear and unambiguous language, gives to his wife absolutely his personal property. Standing by itself, it will admit of no other construction. The plaintiff contends that the words in the second clause, "and at her decease the property remaining to be divided equally amongst children," apply to the gift in the first clause and cut it down to a life estate. This is not the natural or reasonable

construction of the will. An absolute gift, so clearly expressed, cannot be qualified or cut down by a subsequent provision, unless such provision clearly applies to it and shows beyond doubt that such was the testator's intention. The words "the property remaining" have their full force by referring them to the real estate, and cannot by any fair rule of construction be referred to the personal property, which is given absolutely to the wife. *Howland v. Howland*, 100 Mass. 222. We are therefore of opinion that, under the will, the widow took the personal property absolutely as a legatee.

This being so, the plaintiff has not shown any maladministration of the estate which renders the sureties upon her bond liable to this action. As legatee, she had the right to take and appropriate the personal property. There are no creditors, and she alone is interested in the disposition of the property. Such appropriation is an accounting for the personal estate, which relieves the sureties from responsibility. *Mattoon v. Cowing*, 13 Gray, 387.

The plaintiff also assigns as breaches of the condition of the bond, that the executrix did not return an inventory within three months from her appointment, and did not render an account within one year. It appears, however, that an inventory was taken, though not filed within three months; and that the executrix filed the inventory and rendered an account in the Probate Court before this suit was commenced. This was a matter of form rather than of substantial importance, as the executrix was the only person who had any interest in the disposition of the estate; and we are of opinion that it cured any technical breach of the bond caused by the failure to file them at an earlier date. After this, the failure to file the inventory or render the account ceased to be a ground of complaint, or a cause for a suit upon the bond. *Loring v. Kendall*, 1 Gray, 305.

We have thus considered all the questions necessary to the decision of this case. In the view we have taken, the question as to the ownership of the funds deposited by the testator in the savings bank in his name as trustee becomes immaterial. If they were part of the estate, the executrix has properly accounted for them; if they were not, she is not accountable, and the sureties are not liable for them.

The result is that, as the plaintiff has failed to prove either of the breaches of the condition of the bond assigned by him, he cannot maintain this action. *Plaintiff's exceptions overruled.*

Defendants' exceptions sustained.

MASSACHUSETTS GENERAL HOSPITAL vs. CAROLINE E.
FAIRBANKS.

Suffolk. March 22. — June 30, 1880. MORTON, J., did not sit. AMES & LORD, JJ., absent.

If an insane person is received into an asylum, at the request of another, and on an express contract in writing by third persons to pay his board and other expenses there, no promise can be implied on the part of such insane person to pay anything; evidence that credit was given to him by the officers of the asylum is inadmissible; and an action against him by the asylum cannot be maintained.

In an action on an implied assumpsit to recover for board furnished the defendant, the answer alleged that the board was furnished under an express contract by a third person with the plaintiff to pay for it, and that the plaintiff afterwards brought suit against this person and recovered judgment, which was still in force. *Held*, that, under the answer, an express agreement between the plaintiff and the third person was admissible, without regard to the question of the effect of the judgment.

CONTRACT on an account annexed for board and other supplies furnished the defendant at the McLean Asylum for the insane at Somerville, from October 1, 1872, to August 25, 1873.

The writ, dated December 19, 1876, alleged that the defendant was an insane person, and that Edward A. Caswell was her guardian. Service was made upon Caswell, who appeared and filed an answer, alleging that before October 1, 1872, the defendant was insane, and has since continued to be so; that, about October 15, 1869, the plaintiff made an agreement with William A. Towne and Isaac H. Wright for the defendant's board and the supplies to be furnished her at the McLean Asylum while she should be there; that, after she had been removed therefrom, the plaintiff brought an action in the Superior Court on this agreement, against Towne and Wright, for the same cause of action for which this action is brought, and at October term

1875, recovered judgment thereon, which judgment is still in force.

Trial in the Superior Court, without a jury, before *Gardner, J.*, who found for the plaintiff for the full amount claimed; and reported the case for the determination of this court, in substance as follows:

The plaintiff read the pleadings, and rested. The guardian made no objection to the items of the account; but put in evidence, which was admitted against the plaintiff's objection that it was not admissible under the pleadings, of the following facts:

The defendant was received into the McLean Asylum on October 13, 1869, while suffering from an attack of violent and acute mania, on the written request of one of the proprietors of the hotel in Boston where she was boarding, and the certificate of two physicians. On October 15, of the same year, William H. Towne and Isaac H. Wright signed and delivered the following instrument to the plaintiff:

"In consideration of Mrs. Caroline Fairbanks being admitted a patient into the McLean Asylum for the insane, at our request, we, the undersigned, jointly and severally promise the Massachusetts General Hospital to pay the treasurer thereof at said asylum quarterly, on the first days of January, April, July and October, with interest after said days respectively, the rate of board which may from time to time be determined by the trustees of said hospital for said patient; to provide or pay for all requisite clothing and other things necessary or proper for the health and comfort of said patient; to pay for all proper expenses incurred for the return of said patient to the asylum in case of elopement; to remove said patient when discharged; to reimburse funeral expenses in case of death; and if removed uncured against the advice and consent of the superintendent, before the expiration of three calendar months, to pay board for thirteen weeks, the rate at which the patient is admitted below, and the trustees may change the same at any time, giving us three weeks' notice by mail in case the rate is to be raised. Witness our hands this fifteenth day of October, 1869."

On the same paper was the following order of admission, signed by two of the visiting committee of the plaintiff: "Receive the above-named patient if brought within two weeks from

date, at \$30 per week." By virtue of this order, the defendant, after the obligation of Towne and Wright was given, was retained at the McLean Asylum until August 25, 1873, when she was removed to an asylum at Hartford, where she has since remained.

Towne was appointed guardian of the defendant soon after October 15, 1869, and paid the defendant's bills at the asylum until October 1, 1872. Towne resigned his office as guardian on March 10, 1872, and informed the superintendent that he would not be longer liable for the defendant's bills. No other guardian was appointed until April 25, 1873, when Caswell was appointed.

The action set forth in the answer was brought by the plaintiff, and judgment was recovered against Towne and Wright by agreement of parties for the amount due from October 1, 1872, to April 25, 1873.

On this evidence, the defendant asked the judge to rule that the action could not be maintained; but the judge refused so to rule.

The plaintiff then offered in evidence the testimony of Towne that he went to the asylum with the defendant when she was first taken there from the hotel as above stated; and that the superintendent of the asylum asked him about the defendant's means and previous condition, and what she could afford to pay, and was told; that the superintendent also gave him the blank form of obligation, and said that the rules of the institution required this to be signed, but that it was a mere matter of form when insane persons had property. The defendant objected to this evidence, but the judge admitted it for the purpose of showing to whom credit had been given.

The defendant then renewed his request for a ruling that the action could not be maintained; but the judge refused so to rule.

If the rulings were right, judgment was to be entered for the plaintiff; otherwise, such order to be made as the court should deem proper.

D. E. Ware, for the plaintiff.

G. D. Noyes, for the guardian.

SOULE, J. It appeared at the trial in the Superior Court that when the defendant, an insane person, was received by the

plaintiff as an inmate of its asylum, she took no active part in the proceedings. She was admitted on the certificate of two physicians that she was insane, to which was appended an application for her admission signed by the keeper of the hotel at which she was boarding, together with an agreement signed by one Towne and one Wright, that they would pay her board as long as she remained there, and all expenses incurred in clothing her and in providing things proper for her health and comfort, and would remove her when discharged. To these instruments was added the order of the visiting committee of the plaintiff for her admission to the asylum as a patient. These documents taken together constitute the contract under which the plaintiff furnished what it did furnish for the benefit of the defendant. It was not her contract with the plaintiff, but the contract of Towne and Wright, binding on them so long as the defendant remained at the asylum. There was no question open as to whether their undertaking was an original one or a collateral promise. The terms of it admit of but one construction. It was an absolute agreement, in consideration of the admission of the defendant as a patient.

The evidence did not justify any inference that the defendant became liable to the plaintiff for her board and support. The plaintiff having received her under the express contract with Towne and Wright to pay the plaintiff, there was no implied contract on her part to pay anything. There is no room for an implied contract where an express contract exists. Met. Con. 6. *Whiting v. Sullivan*, 7 Mass. 107. If A. contract with B. to furnish board at his expense to fifty men in his employ, and B. furnishes it, there is no implied contract on the part of the boarders to pay each for his own board. And this, not because they are employed by A., but because the board was furnished on A.'s promise to pay for it. In the numerous cases in which the question has arisen to whom was credit given, no express contract in writing, absolute in its terms, existed, and in the absence of such express contract the effort was to ascertain, from the facts surrounding the transaction, to whom credit was given, as an element in determining with whom the contract was made, or whether the undertaking was original or collateral. Of this character are these cases cited by the plaintiff: *Cahill v*

Bigelow, 18 Pick. 369. *Swift v. Pierce*, 13 Allen, 136. *Walker v. Moors*, 125 Mass. 352.

Under the pleadings it was competent for the guardian of the defendant to show the contract which led to the admission of the defendant to the asylum; and when that contract was established it made a complete answer to the plaintiff's claim. The judge who tried the case in the Superior Court erred, therefore, in refusing to rule that on the evidence the action could not be maintained, and there must be a *New trial*.



UNION INSTITUTION FOR SAVINGS *vs.* CITY OF BOSTON & others.

Suffolk. March 23. — June 30, 1880. AMES & LORD, JJ., absent.

Under the St. of 1867, c. 56, § 1, if the parties to a contract stipulate for a higher rate of interest than six per cent, interest after the breach of the contract is ordinarily to be measured by the rate stated in the contract to the time of payment or of judgment.

By the terms of a mortgage of land in a city, the deed was to be void on the payment in five years of a certain sum and interest at the rate of seven and one half per cent per annum. The mortgagor subsequently made another mortgage to a third person, which was foreclosed; and while the first mortgage was in force the land was surrendered to, and taken by, the city, under a statute which allowed the city to make certain improvements and to assess the cost thereof upon the land, and gave any person dissatisfied with the assessment the right to surrender the land to the city. The owner of the equity of redemption filed a petition to have his damages assessed, in which the mortgagee was wrongfully allowed to join, and a new trial was ordered for this reason. On the new trial the jury assessed the value of the land at a much less sum than at the former trial. *Held*, on a bill in equity by the mortgagee against the owner of the equity of redemption and the city, that the plaintiff was entitled, out of the amount awarded, to be paid, in addition to the principal of the mortgage, interest at the rate stated therein after as well as before the time when the mortgage became due.

BILL IN EQUITY, filed November 30, 1878, by a mortgagee of several parcels of land, against the city of Boston, Walter Farnsworth, W. E. Woodward and William H. Piper, to enforce a lien upon money due from the city of Boston for damages for land taken by the city, under the St. of 1873, c. 340. The case

was heard by *Colt, J.*, upon a statement of facts, the material parts of which were as follows:

On June 2, 1871, Woodward and Piper, who then owned the several parcels of land, executed a mortgage of them to the plaintiff, the condition of the mortgage being that, if the grantors should pay to the plaintiff "the sum of one hundred thousand dollars in five years from date, with interest semiannually at the rate of seven and a half per cent per annum," "then this deed, as also one note of even date herewith signed by the said W. E. Woodward and W. H. Piper, whereby they promise to pay to the said corporation or order the said sum and interest at the times aforesaid, shall be void." The note referred to was signed by Woodward and Piper, and was as follows: "Boston, June 2, 1871. For value received, we jointly and severally promise to pay to the Union Institution for Savings in the city of Boston or order the sum of one hundred thousand dollars, in five years from this date, with interest, to be paid semiannually, at the rate of seven and a half per centum per annum during said term, and for such further time as said principal sum or any part thereof shall remain unpaid."

On December 2, 1871, Woodward and Piper made a second mortgage of the same parcels of land to the plaintiff, to secure the payment of the further sum of \$20,000, in four and a half years from that date. The terms of this mortgage deed and of the promissory note given therewith were the same, so far as they related to the payment of interest and the rate, as in the previous mortgage and note.

On October 11, 1873, Woodward and Piper made a third mortgage of the land to William H. Hill, subject to the mortgages to the plaintiff. On October 17, 1874, Hill assigned this mortgage to Farnsworth, who on February 15, 1875, sold the land, for breach of condition, under a power contained in the mortgage, to a person who two days afterwards reconveyed the land to Farnsworth.

Farnsworth never saw the mortgage notes given by Woodward and Piper to the plaintiff, nor knew their tenor, except so far as they were described in the mortgages on record. Interest was paid on both notes to June 2, 1875, and \$5000 was paid on account of the principal of the second note in 1874.

On September 1, 1873, the board of aldermen of Boston passed an order, under the St. of 1873, c. 340, establishing the grade of the Northampton Street District, in which the parcels of land in question were situated, in order to secure complete drainage, to prevent nuisances and to preserve the public health; and on September 5, 1873, an order passed by the city council, directing the owners of lands in that district to raise the grade of their lands, was approved by the mayor. The city entered upon the lands, raised the grade thereof, and assessed the cost to the owners; and on March 8, 1875, Farnsworth notified the city that he was dissatisfied with the assessment on his lands, and offered to surrender them to the city. On March 22, 1875, the committee of the city council to whom was referred this notice reported that no further action was necessary as all the parties having a legal interest had not joined in the surrender. Two days after this, Farnsworth requested the plaintiff to join in the surrender; and the plaintiff, on the same day, gave notice to the city that the plaintiff "approves of said order of surrender, and desires that said premises may be surrendered to said city, conformably to law; yet not so as to affect or impair the rights or security of this corporation to recover the amount due on the mortgages thereof."

In November 1876, the city council passed an order taking the lands in question, which order was approved by the mayor, and was recorded on December 1, 1876, in the registry of deeds. Farnsworth thereupon, not agreeing with the city upon the damage done to him by such taking, filed several petitions in the Superior Court for a jury to assess his damages. The plaintiff in this action petitioned the Superior Court for leave to join in these petitions of Farnsworth, and for an assessment of its damages by reason of the taking; and this petition was granted. At the trial of one of the petitions, it was agreed between the present plaintiff and Farnsworth that, if the jury found for the petitioner, their verdict up to \$131,000 should be for the present plaintiff alone, and that, for any excess above that sum, their verdict should be for Farnsworth; the judge instructed the jury accordingly; and the jury returned a verdict in favor of the present plaintiff for \$131,000, and in favor of Farnsworth for \$11,000. On exceptions taken by the city,

it was held that the present plaintiff, not having taken possession under its mortgages, was not entitled to join in the petition of Farnsworth, and a new trial was ordered. See *Farnsworth v. Boston*, 126 Mass. 1. At the subsequent trial, the jury assessed the value of the same parcel of land at \$112,887.87. In both trials, the court ruled that the damages should be assessed for the value of the land in March 1875.

The plaintiff contended that it was entitled to the principal of the mortgage debt, and to interest at seven and one half per cent from June 2, 1875. Farnsworth admitted the plaintiff's claim, except as to the amount of interest, which he contended should be but six per cent from that date. Since the filing of the bill the plaintiff had been paid the entire amount of its claim except the difference between the two rates of interest, which amounted to the sum of \$6943.12.

The judge made a decree for the plaintiff for that sum and costs; and the defendant Farnsworth appealed.

J. A. Maxwell, for the plaintiff.

J. P. Treadwell, for Farnsworth. There was no contract of any kind between the plaintiff and Farnsworth, and the plaintiff could not have maintained any action against him for the principal or interest of the debt. The obligation of Farnsworth, if any, arises from the equity of the case, and the plaintiff, seeking equity, must do equity. The lien of the plaintiff is on the lands or their proceeds for the debt as it appears by the mortgages, and not as it appears by the notes.

In *Brannon v. Hursell*, 112 Mass. 63, the defendant was the maker of the note, and the case was simply an interpretation of the contract made by him. The rule adopted in that case is contrary to many decisions. See *Cook v. Fowler*, L. R. 7 H. L. 27; *Miller v. Burroughs*, 4 Johns. Ch. 436; *Morgan v. Jones*, 8 Exch. 620; *Keene v. Keene*, 3 C. B. (N. S.) 144; *Moreland v. Lawrence*, 23 Minn. 84; *Cecil v. Hicks*, 29 Gratt. 1; *Eaton v. Boissonnault*, 67 Maine, 540; *Duran v. Ayer*, 67 Maine, 145; *Rushing v. Sebee*, 12 Bush, 198; *Ashuelot Railroad v. Elliot*, 57 N. H. 397; *Burnhisel v. Firman*, 22 Wall. 170. See also *Ayer v. Tilden*, 15 Gray, 178.

A court of equity will take into consideration the fact that, on account of the illegal act of the plaintiff in joining in the

petition of this defendant, there was a long delay in the payment of damages, and the damages were materially reduced.

GRAY, C. J. This is a bill in equity by a mortgagee of land taken by the city for the public use, and the equity of redeeming which from the plaintiff's mortgages is owned by the defendant Farnsworth, to enforce a lien upon the money due from the city for damages for such taking. By the terms of these mortgages, the amounts of the mortgage debts were to be paid in five years, which had elapsed some time before the filing of the bill, "with interest semiannually at the rate of seven and a half per centum per annum;" and the question is, at what rate the interest is to be computed for the time since the principal sums became due.

By the St. of 1867, c. 56, § 1, the legal rate of interest in this Commonwealth is six per cent a year, when there is no agreement for a different rate; and by § 2, it is lawful to contract for any rate of interest, "provided, however, that no greater rate of interest than six per centum per annum shall be recovered in any action, except when the agreement to pay such greater rate of interest is in writing."

When a written agreement is made, as authorized by the statute, to pay a greater rate of interest yearly than six per cent, the intention of the contract and the effect of the statute appear to us to be that the creditor shall receive the stipulated rate of interest so long as the debtor has the use of the principal; and that, in an action upon the contract, the creditor shall recover interest at that rate, not merely until the time when the principal is agreed to be paid to him, but until it is actually paid, or his claim for principal and interest judicially established.

In *Brannon v. Hursell*, 112 Mass. 68, it was accordingly held, in an action upon a promissory note payable in four months, "with interest at ten per cent," that interest was to be computed at that rate, not merely to the maturity of the note, but to the time of the verdict; and upon reconsideration of the authorities there referred to, and examination of the numerous decisions cited at the argument of the present case, we see no reason to overrule or qualify the point adjudged, although the statement in the opinion that "the plaintiff recovers interest, both before and after the note matures, by virtue of the contract, as an

incident or part of the debt," might well be modified so as to say that the interest after the breach of the contract, though not strictly recoverable as part of the debt, but rather as damages, is ordinarily to be measured, according to the intention manifested by the contract, by the standard thereby established.

In *Price v. Great Western Railway*, 16 M. & W. 244, 248, Baron Parke said that the reason why, under a mortgage deed whereby interest is payable up to a certain day, interest beyond that day might be recovered as damages, was "because the deed shows the intention of the parties that it should be a debt bearing interest;" and added, "The jury give it as damages for the detention of the debt. It is not recoverable as interest on the contract itself."

In *Morgan v. Jones*, 8 Exch. 620, the owners of a vessel mortgaged it as security for a debt, with a proviso for redemption on payment of the principal and interest at the rate of ten per cent in six months, but without any provision for payment of interest after that time. The principal not being paid then, it was held by Chief Baron Pollock and Barons Parke, Platt and Martin that the mortgagee was entitled to interest at the same rate until payment; and Baron Parke said: "It was a sale of a chattel, redeemable on a certain day; then, if the mortgagors do not avail themselves of that provision, the same rate of interest continues payable. It is exactly like a mortgage of real estate, where the mortgagee becomes the legal owner."

So in *Keene v. Keene*, 3 C. B. (N. S.) 144, an action by an indorsee against the drawer of a bill of exchange for £200, payable in twelve months, with interest at the rate of ten per cent per annum, was referred to a master, who allowed ten per cent interest after, as well as before, the maturity of the bill. The defendant moved to recommit the case to the master; and argued that there was no implied contract on the part of the drawer, upon the acceptor's default, to pay more than the ordinary interest of five per cent; that the acceptor could only be liable to interest at five per cent after maturity of the bill; and that the bill was in effect a bill for £220. But the court overruled the motion. Mr. Justice Willes said: "Until the maturity of the bill, the interest is a debt; after its maturity, the interest

is given as damages at the discretion of the jury. Here a jury might adopt as the measure of damages the rate of interest which the parties themselves had fixed; and the master is substituted for a jury." Chief Justice Cockburn said: "I see no ground for referring this case back to the master, as prayed. He has, as he well might, given in the shape of damages the rate of interest the parties themselves had contracted for. I think he has done quite right." Mr. Justice Crowder said: "I am of the same opinion. The master would, I think, have acted very unreasonably if he had not assessed the damages by the rate which the parties had stipulated as to the value of the money." And Mr. Justice Williams concurred.

In *Cook v. Fowler*, L. R. 7 H. L. 27, a debtor, on May 2, 1864, gave a warrant of attorney to a creditor "to secure the payment of the sum of £1330, with interest thereon at and after the rate of £5 per cent per month, on the 2d of June next, judgment to be entered up forthwith; and in case of default in payment of the said sum of £1330 and interest thereon on the day aforesaid, execution or executions and other processes may then issue for the said sum of £1330 with interest, together with costs of entering up judgment, &c., &c., and all other incidental expenses whatever." The debtor died before the 2d of June, and no judgment was entered up. The creditor, who also held mortgages on lands of his debtor, concealed his warrant of attorney for three years, and then set it up in answer to a bill of the executors against him for an account, and more than a year later first claimed to be allowed interest for the whole time at the rate of sixty per cent a year. It was held by the House of Lords, affirming a decree of Vice Chancellor Stuart, that he was entitled after the 2d of June, 1864, to ordinary interest only; and this upon two grounds: 1st. That the warrant of attorney and the defeasance did not create a contract, but only an authority to enter up judgment on June 2, 1864, and a stipulation that execution might then issue. 2d. The extraordinary and excessive rate of interest, and the conduct of the creditor.

Although Lord Chelmsford (apparently overlooking the cases of *Morgan v. Jones* and *Keene v. Keene*, above cited) said, "There is no authority that I can find to support the argument of the

counsel for the appellant, that when a security for money payable at a certain day stipulates for the allowance of a certain rate of interest up to the day fixed for payment, interest at the same rate is implied to be payable afterwards;" L. R. 7 H. L. 35; Lord Chancellor Cairns and Lord Selborne were clearly of a different opinion. The Lord Chancellor said that, according to the well-known principle, which had been referred to in many cases, "any claim, in the nature of a claim for interest after the day up to which interest was stipulated for, would be a claim really, not for a stipulated sum and interest, but for damages, and then it would be for the tribunal before which that claim was asserted to consider the position of the claimant, and the sum which properly, and under all the circumstances, should be awarded for damages. No doubt, *prima facie*, the rate of interest stipulated for up to the time certain might be taken, and generally would be taken, as the measure of interest; but that would not be conclusive. It would be for the tribunal to look at all the circumstances of the case, and to decide what was the proper sum to be awarded by way of damages." pp. 32, 33. And Lord Selborne said: "Although in cases of this class interest for the delay of payment *post diem* ought to be given, it is on the principle, not of implied contract, but of damages for a breach of contract. The rate of interest to which the parties have agreed during the term of their contract may well be adopted in an ordinary case of this kind by a court or jury, as a proper measure of damages for the subsequent delay; but that is because, ordinarily, a reasonable and usual rate of interest, which it may be presumed would have been the same whatever might be the duration of the loan, has been agreed to." pp. 37, 38.

In a later case, Lord Justice Amphlett considered it to be clearly established by the previous decisions that in the case of a mercantile security it is to be supposed that the parties intended interest to run on at the old rate if the money was not paid at the date; and so, in the redemption of mortgages, although the day for payment has passed and there is no provision with the creditor for payment of interest after that day, the court will assume that interest is payable after the day at the same rate as before; and that, although what has to be paid may technically be called damages, they are damages of a peculiar

kind, for it would not be left to a jury to regulate the amount ; but the jury would be directed, as a matter of law, to find damages of the same amount as the interest which would have been payable if the promise had extended over the period. *Gordillo v. Weguelin*, 5 Ch. D. 287, 303.

In the very recent case of *In re Roberts*, 14 Ch. D. 49, where by a mortgage deed, reciting an agreement for a loan of £5000 at the rate of ten per cent per annum, the mortgagor covenanted to pay in six months the sum of £250, being half a year's interest on the £5000, and in twelve months the sum of £250, being a further half-year's interest, and also the principal sum of £5000, making together £5250, and made no covenant for the payment of interest in the event of the principal remaining unpaid after the day named for its repayment, but actually paid interest at the rate of ten per cent for three years afterwards, and then died ; and after a decree for administration of his estate, the mortgagee proved as a creditor for principal and interest ; it was indeed held by Sir George Jessel, M. R., and Lords Justices Brett and Cotton, that he was entitled, in such a suit, to interest at the rate of five per cent only. But no decision upon the point appears to have been brought to the notice of the court, except *Cook v. Fowler*, above cited ; and the case was decided upon the assumption that there was no precedent for giving more than the ordinary rate of interest by way of damages. Under such circumstances, the case cannot be considered, by a court not bound by it as authority, to outweigh the decisions of Chief Baron Pollock and Baron Parke, of Chief Justice Cockburn and Mr. Justice Willes, and their associates, and the opinions of Lord Cairns and Lord Selborne, above quoted. It may also be observed that the Master of the Rolls said (without giving any reason why the agreement of the parties should be allowed a greater effect by way of protection of the party who had broken his contract, than for the benefit of the party who by such breach had been deprived of the use of his money) that, if the rate of interest named by the parties were below the ordinary rate, it would be the proper measure of damages ; and that Lord Justice Cotton took the precaution to remark that the court was not deciding what rate of interest should be allowed in a suit for redemption.

Before the decision in *Brannon v. Hursell*, the rule there declared had been established in Indiana, California, Texas, New Jersey, Illinois, Wisconsin, Iowa, Nevada and Tennessee. *Kilgore v. Powers*, 5 Blackf. 22. *Kohler v. Smith*, 2 Cal. 597. *Guy v. Franklin*, 5 Cal. 416. *Corcoran v. Doll*, 32 Cal. 82. *Hopkins v. Crittenden*, 10 Tex. 189. *Wilson v. Marsh*, 2 Beasley, 289. *Phinney v. Baldwin*, 16 Ill. 108. *Etnyre v. McDaniel*, 28 Ill. 201. *Heartt v. Rhodes*, 66 Ill. 351. *Spencer v. Maxfield*, 16 Wis. 541. *Pruyn v. Milwaukee*, 18 Wis. 367. *Hand v. Armstrong*, 18 Iowa, 324. *Thompson v. Pickel*, 20 Iowa, 490. *McLane v. Abrams*, 2 Nev. 199. *Overton v. Bolton*, 9 Heisk. 762. It has since been affirmed by decisions of the highest courts of Ohio, Michigan and Virginia. *Monnett v. Sturges*, 25 Ohio St. 384. *Marietta Iron Works v. Lottimer*, 25 Ohio St. 621. *Warner v. Juif*, 38 Mich. 662. *Cecil v. Hicks*, 29 Gratt. 1. And it has been acted on by Judge Lowell in the Circuit Court of the United States for this District. *Burgess v. Southbridge Savings Bank*, 2 Fed. Rep. 500.

In Connecticut, the law seems formerly to have been considered as settled in accordance with these decisions; and, although some recent *dicta* have a tendency to explain away the grounds assigned in the earlier judgments, there is no adjudication to the contrary. *Beckwith v. Hartford, Providence & Fishkill Railroad*, 29 Conn. 268. *Adams v. Way*, 33 Conn. 419. *Hubbard v. Callahan*, 42 Conn. 524, 537. *Suffield Ecclesiastical Society v. Loomis*, 42 Conn. 570, 575. *Seymour v. Continental Ins. Co.* 44 Conn. 300.

The earlier decisions in New York support the same rule, both as to mortgages and as to ordinary debts. *Miller v. Burroughs*, 4 Johns. Ch. 436. *Van Beuren v. Van Gaasbeck*, 4 Cowen, 496. But in the light of later cases the question may perhaps be considered an open one in that State. See *Bell v. Mayor of New York*, 10 Paige, 49; *Hamilton v. Van Rensselaer*, 43 N. Y. 244; *Ritter v. Phillips*, 53 N. Y. 586. It may be doubted, however, whether the cases of *Macomber v. Dunham*, 8 Wend. 550, and *United States Bank v. Chapin*, 9 Wend. 471, sometimes referred to in discussions of the subject, are really applicable. In one of them, the decision was that a corporation, authorized by its charter to charge interest for a full month on loans for more

than fifteen days and less than a month, could not demand interest at the same rate during subsequent months while such a loan remained unpaid. In the other, the only point decided was, that a bank, limited by statute to six per cent interest on all discounts, was not thereby prevented from recovering the legal rate of seven per cent as damages after breach of the contract by the other party. Each case turned, not upon the terms of a contract, but upon the effect of a peculiar statute, the scope of which was clearly defined and limited. And in neither of them is there any intimation of an intention to overrule the decision of Chancellor Kent in *Miller v. Burroughs*, or that of Chief Justice Savage and Justices Sutherland and Woodworth in *Van Beuren v. Van Gaasbeck*. The case of *Kitchen v. Mobile Bank*, 14 Ala. 233, is like *United States Bank v. Chapin*.

In *Ashuelot Railroad v. Elliot*, 57 N. H. 397, 437, 439, cited for the defendant Farnsworth, the point decided was, that, upon bonds bearing interest at the rate of six per cent annually payable half-yearly, interest, after maturity, and payment of all the coupons, should be computed in equity at the rate of six per cent, without annual or other rests; in short, that compound interest should not be allowed in a suit on the principal debt. That decision, in effect overruling *Peirce v. Rowe*, 1 N. H. 179, accords with the general current of authority, in equity as well as at law. *Ferry v. Ferry*, 2 Cush. 92. *Connecticut v. Jackson*, 1 Johns. Ch. 13. *Van Benschooten v. Lawson*, 6 Johns. Ch. 313. *Mowry v. Bishop*, 5 Paige, 98. *Sparks v. Garrigues*, 1 Binn. 152, 165. *Stokely v. Thompson*, 34 Penn. St. 210. *Doe v. Warren*, 7 Greenl. 48. *Parkhurst v. Cummings*, 56 Maine, 155. It does not affect the question before us.

The leading cases in support of the defendant's view are *Ludwick v. Huntzinger*, 5 W. & S. 51, and *Brewster v. Wakefield*, 22 How. 118.

In *Ludwick v. Huntzinger*, it was held by the Supreme Court of Pennsylvania that, on a bond for the payment of money in twenty-one months, with three per cent interest from date, the obligee was entitled to recover three per cent interest until the time fixed for payment, and six per cent afterwards.

In *Brewster v. Wakefield*, it was held by the Supreme Court of the United States, (reversing the judgment of the Supreme

Court of the Territory of Minnesota in 1 Minn. 352,) that upon a mortgage to secure notes which respectively stipulated for the payment of interest at the yearly rates of twenty-four and twenty-five per cent, where the rate fixed by statute, in the absence of express agreement, was seven per cent, interest at the rate of seven per cent only could be recovered after the maturity of the notes. Chief Justice Taney, in delivering judgment, said: "The contract being entirely silent as to interest if the notes should not be punctually paid, the creditor is entitled to interest after that time by operation of law, and not by any provision in the contract. And, in this view of the subject, we think the Territorial courts committed an error in allowing, after the notes fell due, a higher rate of interest than that established by law where there was no contract to regulate it." He then referred to the cases of *Macomber v. Dunham*, *United States Bank v. Chapin*, and *Ludwick v. Huntzinger*, above stated; and added: "Nor is there anything in the character of this contract that should induce the court, by supposed intendment of the parties or doubtful inferences, to extend the stipulation for interest beyond the time specified in the written contract. The law of Minnesota has fixed seven per cent per annum as a reasonable and fair compensation for the use of money; and where a party desires to exact from the necessities of a borrower more than three times as much as the Legislature deems reasonable and just, he must take care that the contract is so written, in plain and unambiguous terms; for, with such a claim, he must stand upon his bond."

The same rule appears to have been followed by the Supreme Court in a case from the Territory of Utah. *Burnhisel v. Firman*, 22 Wall. 170. And it has since been adopted as a general rule by the courts of Kansas, Minnesota, South Carolina, Rhode Island, Kentucky, Arkansas and Maine. *Robinson v. Kinney*, 2 Kans. 184. *Lash v. Lambert*, 15 Minn. 416. *Moreland v. Lawrence*, 23 Minn. 84. *Langston v. South Carolina Railroad*, 2 So. Car. (N. S.) 248. *Pearce v. Hennessy*, 10 R. I. 223. *Rilling v. Thompson*, 12 Bush, 310. *Newton v. Kennerly*, 31 Ark. 626. *Duran v. Ayer*, 67 Maine, 145. *Eaton v. Boissonnault*, 67 Maine, 540.

But the later judgments of the Supreme Court exhibit a difference of opinion as to the general rule, though not of adjudication in the particular cases before the court.

In *Cromwell v. County of Sac*, 96 U. S. 51, which arose in the Circuit Court of the United States for the District of Iowa upon a bond given in Iowa and stipulating for the payment of ten per cent interest, Mr. Justice Field, delivering the judgment of the Supreme Court, treated the decision in *Brewster v. Wakefield* as based upon the exorbitant rate of the interest, and, after referring to *Brannon v. Hursell* and many of the other American cases above cited, said, "The preponderance of opinion is in favor of the doctrine, that the stipulated rate of interest attends the contract until it is merged in the judgment." And it was held, reversing in this respect the judgment of the Circuit Court, that the construction given by the Supreme Court of Iowa to the statute of that state was conclusive, and that interest must be computed at the rate expressed in the contract to the time of judgment.

On the other hand, in the case of *Holden v. Trust Co.* 100 U. S. 72, which arose in the District of Columbia under a statute like ours except in not allowing the parties to stipulate for interest at a greater rate than ten per cent, it was held, upon a bill in equity, that on a note made payable in four years, with interest at the rate of ten per cent payable semiannually, and secured by a conveyance of real estate in trust, interest from the maturity of the note should be computed at the ordinary rate of six per cent only; and Mr. Justice Swayne, in delivering judgment, said: "The rule heretofore applied by this court, under the circumstances of this case, has been to give the contract rate up to the maturity of the contract, and thereafter the rate prescribed for cases where the parties themselves have fixed no rate. *Brewster v. Wakefield*, 22 How. 118. *Burnhisel v. Firman*, 22 Wall. 170. Where a different rule has been established, it governs, of course, in that locality. The question is always one of local law. This subject was fully examined in the recent case in this court of *Cromwell v. County of Sac*, 94 U. S. 351. [The reference intended is evidently 96 U. S. 51, above cited.] We need not go over the ground again. Here the agreement of the parties extends no further than to the time fixed for the payment of the principal. As to everything beyond that, it is silent. If payment be not made when the money becomes due, there is a breach of the contract, and the creditor is entitled to damages.

Where none has been agreed upon, the law fixes the amount according to the standard applied in all such cases. It is the legal rate of interest where the parties have agreed upon none. If the parties meant that the contract rate should continue, it would have been easy to say so. In the absence of a stipulation, such an intendment cannot be inferred."

The law upon this subject, as declared by the Supreme Court of the United States, would appear to be that in the District of Columbia or in a Territory of the United States, the rate of interest agreed by the parties in the usual form is recoverable to the stipulated time of payment only, and the statute rate of interest afterwards; but that cases arising in any State must be governed by the local law as expounded by its courts.

Two observations may be made on the judgments which are opposed to the decision in *Brannon v. Hursell*. 1st. They admit that the intent of the parties, if expressed with sufficient clearness in their contract, will govern the rate of interest to the time of judgment. *Brewster v. Wakefield* and *Holden v. Trust Co.*, above cited. *Pearce v. Hennessy*, 10 R. I. 227. *Capen v. Crowell*, 66 Maine, 282. *Paine v. Caswell*, 68 Maine, 80. *Gray v. Briscoe*, 6 Bush, 687. *Young v. Thompson*, 2 Kans. 83. 2d. They assume, in opposition to the leading English cases, that, if interest after the maturity of the contract is to be recovered, not as interest, but as damages, it must necessarily be estimated at the ordinary rate.

The question being, as is clearly recognized in the two most recent judgments of the Supreme Court of the United States, one of local law, in deciding which this court is not bound by the opinion of any other tribunal, we are constrained, with great respect for those who take a different view of the subject, to say that the rule established in this Commonwealth by the adjudication in *Brannon v. Hursell* appears to us to best accord with the purpose of the Legislature, with the apparent intention of the parties, with the usage and understanding of men of business, with the weight of legal reasoning and authority, and with the principles of equity that govern the enforcement and redemption of mortgages.

In the case before us, each of the mortgages to the plaintiff, duly recorded, and subject to which the defendant Farnsworth

took his title, makes the payment by the mortgagors of the principal debt in five years, "with interest semiannually at the rate of seven and a half per cent per annum," a condition upon which the mortgage, and "one note of even date herewith" whereby the mortgagors "promise to pay the said corporation or order the said sum and interest at the times aforesaid," shall be void. Each of the notes thus referred to does in the most explicit terms require interest to "be paid semiannually at the rate of seven and a half per centum per annum during said term, and for such further time as said principal sum or any part thereof shall remain unpaid;" and the description of the debt and interest in the mortgage might be held sufficient to give any one taking the land subject to the mortgage such information that he could not redeem the land without paying interest according to the stipulation in the notes, even if by that stipulation such interest was to be computed for a longer period than would appear upon the face of the mortgage taken by itself. *Richards v. Holmes*, 18 How. 143. *Ackens v. Winston*, 7 C. E. Green, 444. But we do not decide that point, because we are of opinion, on the grounds already stated, that the legal effect of the provision of the mortgage is the same as that of the fuller language of the note.

The stipulated rate is only one fifth of one per cent a year higher than the interest payable upon some notes of the United States, and there is no pretence that it is unconscionable or unreasonable. The claim upon the money received by Farnsworth from the city is no less than it would have been against the land for which that money is a substitute. *Farnsworth v. Boston*, 126 Mass. 1. As he might at any time have stopped the running of the interest after the maturity of the notes by performing his obligation and paying the mortgage debt, neither the lapse of time nor the other circumstances of the case afford any reason why the plaintiff should not recover interest at the stipulated rate to the time of the decree. *Decree affirmed.*

NATHANIEL P. LOVERING & another, trustees, *vs.* NATHANIEL P. LOVERING & others.

Suffolk. November 25, 1879. — June 30, 1880.

A testator devised certain real estate to trustees in trust to pay the income thereof to his daughter N. during her life; on her decease, to pay the income of a certain portion of such estate to her daughters A. and M. during their lives, and upon their decease, to convey "said estate" in fee to the heirs at law of A. and M.; upon the decease of N., to pay the income of the remaining portion of the estate "to her children" during their lives, "and as the children of N. successively decease," said remaining portion was "to be conveyed in fee to the heirs at law of all the children of N." At the death of the testator, N. was fifty-five years of age, and had children living. *Held*, that the devise of life estates to the children of N. included children born after the death of the testator; and, it being conceded that, if such was the case, the limitation over to the heirs of such children was void for remoteness, that the estate thus limited passed under the residuary clause of the will, which devised "all the rest, residue and remainder of my estate, real and personal, of every nature and description," although certain other remainders and reversions were therein specified as coming within this general description.

BILL IN EQUITY by the trustees under the will of Joseph Lovering to obtain the instructions of the court. The case was reserved on the bill and answers by *Ames, J.*, for the consideration of the full court, and was as follows :

The testator died on June 30, 1848. His will, which was duly admitted to probate, by the thirteenth article, devised to trustees two stores on State Street, a house on Tremont Street and a house on Hollis Street, all in Boston, in trust to pay the net rents and profits to his daughter Nancy Gay, during her life, "and upon this further trust, upon the decease of said Nancy, to pay over to her daughters Ann L. Gay and Martha Gay the net rents and income of" the Hollis Street estate, "during their lives, and on the decease of said Ann and Martha, successively, to convey in fee, or, in case said estate should be sold, pay over and distribute the proceeds to and among the heirs at law of said Ann and Martha. And on this further trust, upon the decease of said Nancy Gay, to pay the net income of said two stores in State Street, and of said house on Tremont Street, to her children, half yearly, or oftener if convenient to said trustees, during the lives of said children. And as the children of said Nancy shall successively decease, said stores in State Street and said

house in Tremont Street are to be conveyed in fee, or in case the same be sold, the proceeds are to be paid and distributed to and among the heirs at law of all the children of said Nancy, that is to say, that as said Nancy's children shall successively decease, a proportion of said estate, or the proceeds, are to be conveyed or distributed to and among the respective heirs at law of each child so deceasing, said Nancy's grandchildren to take in right of representation of their deceased parents."

By other articles of the will provisions similar in substance were made for his sons Nathaniel and Joseph and their children.

By the nineteenth article of the will the testator gave to the same trustees "all the rest, residue and remainder of my estate, real and personal, of every nature and description, including the reversion and remainder of all sums of money hereinbefore given to said trustees for the support of life annuities to my wife and children, and the widows of my children, and not given over, after the decease of the annuitants, together with all the estates, real and personal, which may be released to my trustees by the heirs or assigns of George Gay, Esq., and by my wife, and all my property or estate not bequeathed or devised in this will, whether in possession or reversion," in trust to pay the net income to his five children during their respective lives. "And on this further trust, on the decease of my said five children, successively, to convey in fee, pay, deliver over and distribute the same residue and remainder of all my estate, real and personal, or the proceeds thereof, and all estates, property, stocks and securities in which the same may be invested, to and among my grandchildren and the lineal descendants of my deceased grandchildren, that is to say, as each of my five children shall successively decease, one fifth part of said residue and remainder at the death of each child shall be distributed and divided to and among all my grandchildren then living and the lineal descendants of my deceased grandchildren: my said grandchildren to take *per capita*, and the lineal descendants of deceased grandchildren to take in right of representation of their deceased parents."

At the death of the testator, there were five children of his living, namely, William Lovering, aged sixty-two years, Nancy

Gay, aged fifty-five, Caroline Worthington, aged fifty-two, Joseph Lovering, aged forty six, and Nathaniel P. Lovering, aged forty. William died, April 27, 1869; Nancy, February 12, 1870; Caroline, April 30, 1877; and Joseph, on August 8, 1875. There were also living at the death of the testator a large number of grandchildren; and after his death there were only four grandchildren born, and these were children of the testator's son Joseph. George H. Gay, a son of Nancy Gay, died on August 12, 1878. There are now living a son of the testator, Nathaniel P., grandchildren, great-grandchildren and great-great-grandchildren, whose names were set forth in the bill.

The trustees asked the court to instruct them upon the following points:

"First. Whether the limitations of said trust estate, to wit, of the two stores on State Street and of the house on Tremont Street, are valid beyond the life estates limited to the children of said Nancy, or are void as tending to create perpetuities in contravention of law.

"Second. Whether, if said limitations are void, the trust estates before mentioned pass by descent to said testator's heirs at law, or fall within the operation of the residuary clause of said will.

"Third. If said trust estates fall within the operation of the residuary clause of said will, whether the share of said George H. Gay, deceased, which it is now the duty of the trustees to divide and distribute, should be divided into five equal parts, of which four parts are to be divided and distributed among those grandchildren of the testator, and their lineal descendants, who were living at the respective deaths,—William Lovering, Nancy Gay, Joseph Lovering, Jr., and Caroline Worthington,—one part being divided among each class of grandchildren, and the fifth part be paid into the residuary fund; or how otherwise it should be divided and distributed."

H. W. Paine, for the children of George H. Gay.

A. Russ & D. A. Dorr, for other defendants.

MORTON, J. The thirteenth clause of the will of Joseph Lovering, in regard to which the plaintiffs by this bill seek the instructions of the court, was considered in *Lovering v. Worthington*, 106 Mass. 86; and it was held that the limitation of life

estates to the children of Mrs. Nancy Gay after her decease was not void for remoteness. The question now presented, which has arisen by the subsequent death of her son, George H. Gay, whether the limitation over of the fee to the heirs at law of the children of Mrs. Gay is void, was not considered. It is conceded that, if the devise of life estates to the children of Mrs. Gay would include children born after the death of the testator, the limitation over to the heirs of such children is void for remoteness. We are of opinion that it would include after-born children. It is a testamentary gift to a class which is made by the testator to take effect at a period later than his death. The general rule is that those who come within the description before the gift is to take effect will be included within the class as being within the intention of the testator. We see nothing in this will which indicates that it was the intention of the testator that this rule should not apply in its construction. His purpose was to make provision for all his grandchildren who should be living at the death of their respective parents. He makes the same provisions substantially in favor of his sons Nathaniel and Joseph and their children, the latter of whom had in fact several children born after the death of the testator. There is no rule of construction by which these after-born children can be excluded from the bounty of their grandfather. It is true that it was not probable that Mrs. Gay would have after-born children; but it was possible, and the question of remoteness must be determined with regard to possible events, and not to those which actually or may probably occur. We are, therefore, of opinion that the limitation over to the heirs at law of the children of Mrs. Gay is a violation of the rule of law against perpetuities, and is void.

This being so, the estate thus limited over passes under the residuary clause of the will. A general residuary gift carries all property which is not otherwise disposed of by the will, and includes all lapsed legacies and all void legacies. *Bigelow v. Gillott*, 123 Mass. 102. In this case, the residuary gift is of "all the rest, residue and remainder of my estate, real and personal, of every nature and description." The fact that he specifies certain remainders and reversions as included within this general description, does not limit or narrow it. It was plainly intended, as is said in a later part of the same clause, to include

"all my property and estate not bequeathed or devised in this will, whether in possession or reversion." Such a clause includes void legacies, in the absence of any evidence of a distinct intention to the contrary. This subject is fully discussed in *Thayer v. Wellington*, 9 Allen, 288, which, upon this point, is decisive of the case at bar. We do not understand that there is any controversy as to the proper disposition of this share of which George H. Gay was the life tenant, and which has now fallen into the residuary fund. The provisions of the residuary clause are clear and explicit. As one only of the five children of the testator is now living, one fifth of the fund is to be held in trust for his benefit during his life. The remainder is to be divided into four parts, of which one part is to be distributed in the same manner as if it had formed a part of the residuary fund at the death of William Lovering, and the other three as if they had respectively formed parts at the respective deaths of Nancy Gay, Caroline Worthington and Joseph Lovering; and each part is to be divided among all the grandchildren of the testator living at said respective times, and the lineal descendants of any deceased grandchildren, if any, the grandchildren to take equally *per capita*, and the lineal descendants of any deceased grandchild to take in right of representation of their deceased parent, that is, the share which their parent would have taken if living.

Decree accordingly.



COMMONWEALTH vs. ALEXANDER LESTER.

Suffolk. Jan. 30. — June 24, 1880. MORTON & SOULE, JJ., absent.

An indictment, under the Gen. Sts. c. 161, § 15, for larceny in a building, is not sustained by evidence that the owner of the property, which was part of a stock of goods in a shop, placed the property in the hands of the defendant for inspection, who ran off with it, while the owner momentarily turned his back upon him.

INDICTMENT on the Gen. Sts. c. 161, § 15, charging the defendant with the larceny of two watches, the property of Thomas S. Davis, in a building also the property of Davis. Trial in the

Superior Court, before *Bacon*, J., who allowed a bill of exceptions in substance as follows:

The government called as a witness Thomas S. Davis, who testified, that on the day in question the defendant came into his shop and asked to look at some watches; that he handed him one open-faced watch, which the defendant looked at, and then asked to see a hunting-case watch; that he took an empty watch-case, and, transferring the works from a silver watch, placed them in the hunting-case, and passed it also to the defendant for his inspection; that he was not sure whether the defendant held the watches in his hand or whether they were lying on the show-case; that he turned partially around to place a screw driver, which at the time he had in his hand, on a shelf behind the counter, on the inner side of which he was standing at the time, at which time his eye was removed from the watches which he had placed before the defendant; that he turned almost immediately and saw the defendant running towards the door, and saw that the watches were gone; that he instantly ran after the defendant, who, when overtaken, had the watches in his possession. He further testified, that he was in charge of the property and the watches, which were on the side of the shop occupied by him, when the prisoner came in; that he was on the inner side of the counter, opposite the prisoner, who was on the outside of said counter, and about five feet from the door when the watches were shown to him and when he ran away with them. He testified that he hired and occupied one half the store, — the other side being hired and occupied by one Simonds, who was in his (Simonds's) part of the store when the watches were stolen, and whom he left in charge of his (said Davis's) part of the shop, when he ran after the defendant. This was the only evidence introduced tending to show the circumstances under which the property was stolen, and no evidence was introduced by the defendant to contradict or control it.

The defendant requested the judge to instruct the jury, as matter of law, that this evidence was insufficient in law to warrant them in finding the defendant guilty of larceny in a building; that the facts, as testified to by Davis, constituted the offence of simple larceny only, and not the offence of larceny in a building; but the judge declined so to rule, and instructed the

jury that he should leave it to them to find, on the evidence, whether or not the offence was larceny in a building, or simple larceny; and ruled, as matter of law, that "if the property was stolen by being taken by the defendant, at a time when the owner's attention was for any cause diverted from it, so that it was not under his immediate control, then the larceny would be in the building;" and that, "if the owner's attention was in this case diverted from the immediate oversight of the property, and the defendant took advantage of such diversion to take the property, the offence of larceny in a building is proved."

The jury returned a verdict of guilty; and the defendant alleged exceptions.

W. W. Doherty, for the defendant.

G. Marston, Attorney General, for the Commonwealth.

AMES, J. In an indictment founded upon the Gen. Sts. c. 161, § 15, for larceny in a building, it is not enough to prove that the property stolen was in a building at the time of the theft, and that the defendant was the thief. It is necessary to show also that the property was under the protection of the building, placed there for safe keeping, and not under the eye or personal care of some one in the building. The watches in this case were a part of the owner's stock in trade, usually kept by him in the building. But his testimony, which was the only evidence to the point, is to the effect that he was in charge of the property, when the defendant came in and asked to look at some watches, and that he handed the watches to the defendant; that he was not sure whether the defendant held the watches in his hand, or whether they were lying on the show-case; and that they were stolen while he turned partially round to place something upon the shelf behind him. If they were upon the show-case when stolen, it would be at least doubtful whether they must not, under the circumstances, be considered as rather in the possession of the owner than under the protection of the building. If by the act of the owner they were in the hands of the defendant, they certainly derived no protection from the building. As the evidence left it wholly uncertain whether they were on the show-case or in the defendant's own hands, it did not warrant a conviction of larceny in a building; and the jury should have been so instructed. *Rex v. Campbell*, 2 Leach (4th

ed.) 564. *Rex v. Castledine*, 2 East P. C. 645. *Rex v. Watson*, 2 East P. C. 680; *S. C.* 2 Leach, 640. *Rex v. Hamilton*, 8 Car. & P. 49, 50, note. *Commonwealth v. Smith*, 111 Mass. 429.

Exceptions sustained

COMMONWEALTH vs. DANIEL SMITH.

Suffolk. March 24. — June 24, 1880. AMES & LORD, JJ., absent.

On an indictment under the Gen. Sts. c. 161, § 38, for embezzlement, the fact that the defendant, an agent employed to sell goods and authorized to receive payment therefor, is paid in part by commissions on such sales, is immaterial.

If an agent, authorized to receive payment for goods sold by him on account of his employer, receives a check payable to his own order, the property in the check does not vest in him, and, if he fraudulently converts the check or its proceeds, he may be found guilty of embezzlement, under the Gen. Sts. c. 161, § 38, although, by the course of business between him and his employer, he was in the habit of depositing such checks to his credit in a bank, and sending his own checks in lieu thereof.

It is no defence to an indictment for the larceny of intoxicating liquors, or to an indictment for embezzling the proceeds of the sales of such liquors, that the liquors were kept for sale, or sold in this Commonwealth, in violation of law.

At the trial of an indictment for embezzlement, there was evidence that the defendant, an agent, was authorized to receive payment for goods sold by him and was entitled to receive commissions on such sales; that he received a check, deposited it to his credit, and sent his own check for the amount to his employer, which was not paid. *Held*, that the check sent by him was admissible in evidence; and that evidence was also admissible to show that his commissions were always paid by his employer, and that he was not authorized to deduct them from the proceeds of sales.

INDICTMENT containing seventeen counts, some for larceny, and some, under the Gen. Sts. c. 161, § 38, for embezzlement. At the trial in the Superior Court, before *Pitman*, J., a verdict of not guilty was returned on the fifth count, and a *nolle prosequi* was entered as to all the other counts except those hereinafter stated, on which the defendant was found guilty; and a bill of exceptions, in substance as follows, was allowed:

The second count charged the embezzlement of twelve hundred and thirty-one dollars. The fourth count, the larceny of four hundred and twenty gallons of distilled spirits, and of four hundred and twenty gallons of whiskey. The seventh count,

the embezzlement of seven hundred and sixty dollars. The tenth count, the embezzlement of eight hundred and sixteen dollars. The twelfth count, the embezzlement of nine hundred and sixty-five dollars. The fifteenth count, the embezzlement of eleven hundred and fifty-nine dollars. The counts for embezzlement alleged the money taken to be the property of Rachel S. Gaff and Oliver Perrin, copartners; and the count for larceny alleged the goods taken to be the property of Oliver Perrin.

The defendant had been employed by the firm of J. W. Gaff & Company, of Cincinnati, Ohio, distillers of whiskeys, under a written contract, dated October 10, 1876, by the terms of which he was "to sell our whiskeys and distilled spirits in the New England States;" and to "receive in lieu of salary" certain specified commissions. "All goods to be priced to the said D. Smith at our lowest net cash price; and for any advance that the said D. Smith may be able to obtain from any customers in the said New England States, over and above our net cash prices, the said D. Smith shall receive fifty per cent of any such advance, in addition to the commissions already named above; the said Daniel Smith shall devote his entire time and attention to the sale of our goods, visiting such cities and towns in New England as said Daniel Smith or ourselves shall deem expedient for the proper sale of our goods, and as often as the necessities of the trade demand it; the said Daniel Smith, in consideration of above commissions, shall pay his own travelling and incidental expenses, and shall receive no other salary or pay for his services than the commissions above named; the said D. Smith shall report all sales as fast as they are made directly to us, and no sales shall be considered binding until approved by us; upon all time sales he shall get three cents advance upon our net cash price for sixty days' time, for thirty days one cent, and for ninety days four cents; also, in consideration of above commissions, he shall guarantee say fifteen per cent of all sales made by him or to his territory; the said Daniel Smith shall put a limit upon what credit each and every customer in said New England States shall be entitled to, and that we shall at no time exceed said limit except upon our own risk, or upon consultation with him."

Thomas T. Gaff, a witness for the government, testified that he was manager of the business of the firm of J. W. Gaff & Company, of which firm Oliver Perrin was a partner; that the defendant was paid his commissions directly from the firm; that he would draw on them and they would accept his draft, and that this was the only way in which he was paid; that he received no commission for making collections, had no authority to use such collections for himself, was not permitted to deduct a commission for sales out of a collection, and had never done so; that for some time the defendant had made various collections for the firm, and it had been their practice to receive them and ratify them; that they found no fault with this course of business, but only with his not paying over; that in all these collections the defendant never sent bank-bills by express, but forwarded a check of the amount of the collection, payable to their order, and signed either by himself or the creditor from whom the collection was made.

As to the second count, there was evidence that the defendant, on July 25, 1879, at Springfield, Massachusetts, collected by a check to his order, which he indorsed and got cashed at a Springfield bank, \$1231.23, from Eugene Lynch, in payment for a bill of goods, sold by him on behalf of the firm, and five days afterward wrote a letter from Boston, remitting his own check, on the Columbian National Bank of Boston, payable to the order of J. W. Gaff & Co., for the same amount, and that this check was never paid. The government put this check in evidence, against the objection of the defendant, who also objected to the evidence of the way in which he was paid his commission. It appeared, further, that the firm, by its letters, had instructed the defendant to make a settlement of this bill and collect the same.

As to the seventh count, there was evidence that Joseph Doherty, by a note due April 8, 1879, had settled his bill of goods sold on behalf of the firm by the defendant at Boston, which note the firm had put into a bank for collection, and the same remained unpaid; that on May 30, 1879, they forwarded the note to the defendant, with instructions to collect it, and wrote several letters between that date and July 23, 1879, calling upon the defendant to return the note and make a report thereon,

to which no answers were ever given; that Doherty, on April 25, 1879, paid the defendant, in bank-bills, silver, and, possibly, a small check, the amount of said note, taking a receipt therefor, signed by the defendant as agent of said firm; and that this payment was never remitted to said firm.

As to the tenth count, there was evidence that the defendant, on July 9, 1879, was paid by Austin Cannon, in bank-bills, the sum alleged in that count, for goods sold on behalf of said firm, by the defendant, at Boston; and that this sum was never paid over to the firm.

As to the twelfth and fifteenth counts, there was evidence that John J. McCormick and Daniel Shea, in July 1879, severally paid to the defendant, by their checks to his order, the several amounts in those counts, in settlement for bills of goods sold to them, on behalf of said firm, by the defendant, at Boston, and took receipts therefor, signed "D. Smith, for J. W. Gaff & Co.;" and that these collections were never received by the said firm.

Upon the tenth, twelfth, and fifteenth counts no special order had been given to the defendant to collect.

The government introduced evidence, that about July 30, 1879, the defendant left Boston, abstracting from his safe his journal, ledger, and a book kept in accordance with rules of the United States Internal Revenue, wherein all sales of liquors and the serial numbers of the barrels were required to be entered; that afterwards he was traced to Leadville, Colorado, where he was living under the name of Williams, and was arrested; that he subsequently admitted that he had destroyed his books, had lost ten or twelve thousand dollars in gambling, was sorry for what he had done, and, if he should be imprisoned for five years, would do all in his power to make restitution to the firm.

The defendant put in checks upon the First National Bank and Columbian National Bank, both of Boston, for various sums, amounting in all to more than \$16,000, having numerous dates, between October 1878, and June 1879, signed by the defendant, and payable to the order of J. W. Gaff & Co.; and showed that neither the defendant nor said firm, during the time covered by the indictment, had any license to sell liquors in Boston, where the defendant had his office.

The defendant asked the judge to rule, that, if the defendant received from a customer, in payment for a bill for Gaff & Co.'s goods, a check payable to the defendant's own order, he could not be convicted of embezzling the money of Gaff & Co. But the judge declined so to rule, and instructed the jury that there was no variance between money and a check ; and if the defendant received a check for a bill of said goods, although payable to his own order, he could be convicted on the charge of embezzling the money of Gaff & Co., if the other elements constituting embezzlement were proved.

The defendant also requested the judge to give the following, among other instructions, as to embezzlement :

"1. If by the terms of an agent's employment he is bound to pay over to his principals the proceeds of sales specifically, and in the same shape as was received, and transmit to them the same identical bank-bills, coin, or checks received by him, without authority to mix the same with his own funds, a fraudulent conversion of them would be embezzlement. But if, from the terms of his employment, or the understanding between him and his employers, or the previous usage and course of business between them, or the nature of the business itself, or otherwise, Smith had authority to mix the proceeds of the sales and collections made by him with his own funds, his use of them, and not paying over the amount so received by him, would not be embezzlement. 2. The kind of agent meant in the statute against embezzlement is an agent employed in a lawful business ; and if the business in which Smith was employed by Gaff & Co. was to sell their whiskey and liquors here, and neither of them had a license to sell the same here pursuant to our law, the business was an unlawful business, and Smith would not be liable to indictment as an agent of Gaff & Co., within the meaning of the statute, for the embezzlement of their property, which came to his hands as their agent here, and was entrusted to him in the course of transacting and carrying on such unlawful business."

The judge gave the last part of the first request, commencing with the words, "But if," in the language requested, but omitted the words, "and in the same shape as was received, and transmit to them the same identical bank-bills, coin, or checks received by him," in the first part of the first request, and instead

thereof instructed the jury that, if it was the defendant's duty to pay over the specific fund received by him, it would not be affected by a mere change in the form of the fund for convenience; that is, if the defendant received gold in payment, he could change it to bills or a check. If the fund retained its identity, so long as it retained its identity it was Gaff & Co.'s; and a fraudulent conversion of the fund would be embezzlement. But if he was not bound to pay over the specific amount received by him, but had authority to mix it with his own, and account at some future time, then it would not be embezzlement; and that any variance between money and a check was cured by the Gen. Sts. c. 161, § 42.

The judge declined to give the second instruction asked for, and instructed the jury on this point, that, even if the business was unlawful, the defendant might be convicted of larceny and embezzlement; that the law was violated whether the business was lawful or unlawful; and, without ruling whether the sales were made in Boston or in Cincinnati, instructed the jury that the question of the lawfulness or unlawfulness of the business was immaterial in a criminal case of this kind. Other and full instructions upon the law of larceny and embezzlement upon points not embraced in defendant's requests were given, and not excepted to. The defendant alleged exceptions.

I. W. Richardson & J. S. English, for the defendant.

G. Marston, Attorney General, & *F. H. Gillett*, Assistant Attorney General, for the Commonwealth.

COLT, J. The defendant was employed by Gaff & Co., distillers, to sell their goods in the New England States, under a written contract by which he became their agent, and was to receive commissions and a part of the profits, in lieu of salary, as compensation for his services. By the contract, he had no right of property in the goods, or the money received for them. The relation between him and his employers was such, that a felonious conversion to his own use of the money collected from sales on their account would constitute the crime of embezzlement. He was an agent, authorized to receive money on account of his employers, and it is immaterial that his services were paid for, in whole or in part, by commissions or profits on such sales. Under the English statute against embezzlement by

clerks or servants, it is held, in several cases, that the allowance of a portion of the profits on goods sold will not destroy the relation of master and servant. *Rex v. Hartley*, Russ. & Ry. 139. *Rex v. Hoggins*, Russ. & Ry. 145. *Rex v. Carr*, Russ. & Ry. 198. 2 Arch. Crim. Pl. (8th ed.) 450.

In the case at bar, the jury, under the instructions given, must have found a fraudulent conversion of money, which the defendant was bound by the terms of his employment to pay over to his principals, as the specific proceeds of sales made by him, and that he had no authority, either by the terms of the contract, or the usage, nature, and course of the business, to mingle the same with his own funds. This is sufficient to support the verdict, even if the defendant, without destroying the identity of the fund belonging to his employers, had in fact changed its form from checks to bank-bills.

The instructions requested by the defendant upon this point could properly be given only as modified by the judge. The fact that the defendant received for the goods of his employers a check payable to his own order, did not vest in him the title to the check, or its avails. The relation of debtor and creditor did not exist, and the specific proceeds of the sales, whether in cash or in checks payable to their agent's order, belonged to his employers, and were held in trust for them, so long as the fund was capable of identification. *Commonwealth v. Tuckerman*, 10 Gray, 173, 196. The transaction is the same whether the defendant received the price of the goods sold in bank-bills from the hand of the purchaser, or in a check, upon which he received the money or a credit at the bank. Under the statute, proof of the embezzlement of a bank check is sufficient to sustain an indictment for the embezzlement of money. Gen. Sts. c. 161, § 42.

. The evidence which tended to show, from the course of business, that the defendant was permitted to deposit all money collected to his own credit, and remit by his own check payable to the order of his employer, was for the consideration of the jury. But the jury found that the defendant had no authority to mingle the money of his employers with his own money, and so become thereby a debtor for the amount belonging to them.

By the second request for instructions, the judge was asked to rule, in substance, that the defendant would not be liable for the embezzlement of the proceeds of liquor, sold by him as agent for the owners, in violation of the license laws of this Commonwealth. This instruction was properly refused. The fact that no action upon an express contract, or for money had and received, would lie to recover money received by such agent, does not show that one who steals or embezzles it is not liable to criminal prosecution. The law refuses its aid to a party seeking to enforce an illegal contract. The right by suit at law to collect debts contracted in an illegal traffic may be forfeited. But money received in such traffic is still property, which the law protects against wrongdoers. There is nothing in the statutes in relation to the sale of intoxicating liquors to prevent the owner from maintaining an action to recover such property or its value, when tortiously taken from his possession, or the possession of his agent. *Booraem v. Crane*, 103 Mass. 522. He may forfeit or lose his property in such goods, when upon proper legal process it appears that they were procured for an illegal purpose, but only upon such proof, and in the methods pointed out by the law. Until then he has a property in them, and in the proceeds of them, which may be the subject of larceny or embezzlement. *Commonwealth v. Coffee*, 9 Gray, 139. The possession of the alleged owner is sufficient title against a stranger or a thief. The violation of the license law is dealt with by itself, and subjected to such punishment as is provided therefor, and a theft or embezzlement of property, illegally acquired by another, is treated by itself, and punished as such. *Commonwealth v. Rourke*, 10 Cush. 397.

The case of *Regina v. Hunt*, 8 Car. & P. 642, as we understand it, is not in conflict with this. It is briefly reported, but it appears that the money charged to have been embezzled was taken by the servant of a society which, under an existing statute, was an unlawful association.

The objection was taken, that property could not be laid in the indictment as belonging to persons so illegally combined together, and it was held to be well taken, on the ground, as we are left to infer, that a combination of individuals wholly illegal, could not have legal title in money, which was acquired,

and could be used, only for the illegal purposes of the association.

The evidence produced by the government to show that the commissions to which the defendant was entitled were paid by his employers, and not left to be deducted from money in his hands, and the defendant's check which was sent to Gaff & Co. to pay the full amount of the debt collected by him, and which was offered for the same purpose, do not appear to have been improperly admitted. The whole evidence is not reported, and it does not appear in what connection this evidence was used. It was at least competent, as tending to show the existence of criminal intent on the part of the defendant.

Exceptions overruled.



COMMONWEALTH vs. BENJAMIN F. DARLING.

Essex. Nov. 5, 1879. — June 29, 1880. COLT & AMES, JJ., absent.

Several counts for similar offences may be joined in one indictment.

It is no misjoinder to charge in the same indictment, either in one or in several counts, one person with breaking and entering a building and stealing therein, and another person with receiving the goods stolen.

INDICTMENT found at May term 1879 of the Superior Court for the county of Essex, containing nine paragraphs, the first three of which were as follows:

"The jurors for the Commonwealth of Massachusetts, upon their oath present, that Albert R. Pemberton, late of Haverhill in said county of Essex, on the first day of February in the year of our Lord one thousand eight hundred and seventy-nine, and in the night-time of said day, at Haverhill, in the county of Essex aforesaid, the building of one George H. Nichols, James M. Nichols and George H. Leighton, situated in said Haverhill, the said building being then and there occupied by said George H. Nichols, James M. Nichols and George H. Leighton as a shop, feloniously and burglariously did break and enter with intent then and there in said building feloniously and burglariously to

commit the crime of larceny, against the peace of the Commonwealth aforesaid, and contrary to the form of the statute in such case made and provided.

“And the jurors aforesaid, upon their oath aforesaid, do further present, that said Albert R. Pemberton, on the first day of February, in the year aforesaid, at said Haverhill, six dozen sheep roans, of the value of five dollars each dozen, and five hundred and sixty pairs of soles, of the value of ten cents each pair, of the goods and chattels of said George H. Nichols, James M. Nichols and George H. Leighton, and then and there in the possession of said George H. Nichols, James M. and Leighton being found, in the building of said George H. Nichols, James M. and Leighton, in said Haverhill, then and there feloniously did steal, take and carry away in the building aforesaid, against the peace of the Commonwealth aforesaid, and contrary to the form of the statute in such case made and provided.

“And the jurors aforesaid, upon their oath aforesaid, do further present, that Warren R. Goodwin and Benjamin F. Darling afterwards, on the said first day of February in the year aforesaid, at said Haverhill, the goods and chattels aforesaid, so as aforesaid feloniously stolen, taken and carried away, feloniously did receive and have, and did then and there aid in the concealment of the same, the said Goodwin and Darling each then and there well knowing the said goods and chattels to have been feloniously stolen, taken and carried away, against the peace of the Commonwealth aforesaid and contrary to the form of the statute in such case made and provided.”

The fourth, fifth and sixth paragraphs of the indictment were respectively like the first, second and third, except in laying the ownership and the possession of the building entered and of the goods stolen in Ira O. Sawyer and Arthur B. Priest. And the seventh, eighth and ninth paragraphs were similar, except in alleging such ownership and possession to have been in Charles O. McLean, and the offences to have been committed on March 1, 1879.

Pemberton pleaded guilty; and Darling, before the jury were empanelled, moved to quash the indictment for the following reasons: “1st. Because there is a misjoinder of counts therein

2d. Because there is a misjoinder of offences therein." *Rockwell*, J. overruled the motion, and allowed a bill of exceptions, tendered by Darling, which stated that "Goodwin and Darling were then tried, and a verdict of guilty was returned against them upon the sixth and ninth counts."

B. F. Brickett, for Darling.

G. Marston, Attorney General, for the Commonwealth.

GRAY, C. J. It is immaterial whether this indictment is treated, as in the bill of exceptions, as containing nine counts; or, as appears to have been the intention of the pleader, as containing three counts only, each consisting of three paragraphs or allegations, alleging respectively a breaking and entering, a stealing, and a receiving of the goods stolen. See *Commonwealth v. Glover*, 111 Mass. 395; *Commonwealth v. Cohen*, 120 Mass. 198. In either view, a majority of the court is of opinion that it is conclusively established by authority that there is no misjoinder, either of offences or of counts.

In this Commonwealth, several counts for similar offences whether misdemeanors or felonies, may be joined in one indictment. *Pettes v. Commonwealth*, 126 Mass. 242, 245. A thief and a receiver of goods stolen may be indicted together. *Commonwealth v. Adams*, 7 Gray, 43. In an indictment for breaking and entering a building, with intent to steal, it is usual, though not necessary, to allege an actual stealing therein; and if one person is charged both with breaking and entering and with stealing, he may be convicted and sentenced for either offence, or, if the two offences are charged in separate counts and are proved to be distinct, for both. *Crowley v. Commonwealth*, 11 Met. 575. *Jennings v. Commonwealth*, 105 Mass. 586.

If one person breaks and enters a building and steals therein, and another person takes no part in the transaction until after the breaking has been accomplished, but participates in the subsequent stealing, each may be convicted and sentenced accordingly, the one for the breaking and entering, and the other for the stealing, under an indictment which charges both defendants with having jointly committed both offences. Stark. Crim. Pl. (2d ed.) 38, 44. *Rez v. Butterworth*, Russ. & Ry. 520. Or they may be separately charged in one indictment, according to the actual facts of the case, the one with breaking and entering and

stealing, and the other with stealing only, or with receiving the goods stolen. *Rex v. Hartall*, 7 Car. & P. 475. *Rex v. Austin*, 7 Car. & P. 796. *Commonwealth v. Hills*, 10 Cush. 530, 533.

Exceptions overruled.

COMMONWEALTH vs. JAMES L. SARGENT.

Suffolk. Nov. 24, 1879. — July 10, 1880. MORTON & SOULE, JJ., absent.

An indictment against S. for perjury alleged that the defendant offered himself as bail for a person under arrest for an offence, and, on his examination before a bail commissioner, made a statement under oath that he had certain personal estate of a value not less than fifteen hundred dollars, "whereas in truth and in fact said S. did not then and there have personal estate of the value of not less than fifteen hundred dollars." *Held*, that there was a good assignment of the falseness of the statement.

If an indictment for perjury contains several assignments of the falseness of the statements alleged to be made, and one of them is sufficiently set forth, the defendant has no ground of exception to the admission of evidence applicable to all the assignments, if he does not request the evidence to be confined to the valid assignment.

If an indictment for perjury alleges that the defendant, being required "to make a written statement under oath" of his property, and, "being duly sworn, did, in pursuance of said requirement, make said statement," evidence that the defendant was not sworn until after the statement was reduced to writing is not a variance.

At the trial of an indictment for perjury, on the issue whether the defendant had made false statements as to his residence and property, it appeared, by the bill of exceptions, that "A. and other witnesses for the government" testified to facts which tended to show that the statements were false. *Held*, that the defendant had no ground of exception to the refusal of the judge to rule that there were not two sufficient witnesses to the falseness of the statements.

At the trial of an indictment for perjury, the defendant testified that a statement, alleged to be false, that he owned certain property, was true. *Held*, that he could not, in support of his testimony, put in evidence that, a short time before making the statement, he had told several persons that he owned the property. No exception lies to the refusal to give an instruction based on facts not appearing in the bill of exceptions.

INDICTMENT for perjury, as follows :

"The jurors for the Commonwealth of Massachusetts on their oath present, that on the eleventh day of January in the year of our Lord one thousand eight hundred and seventy-nine, at Boston in the county of Suffolk, one Josie Bradley was lawfully

apprehended and arrested upon the charge and offence of being a common night-walker, theretofore and then committed by her, said Bradley, in said Boston; and in a convenient place, to wit, the station-house situated on Joy Street in said Boston, duly and legally kept in custody upon the charge aforesaid; that on said eleventh day of said January, and while said Bradley was held in custody in said station-house upon the charge aforesaid, said Bradley made due application to Charles A. Barnard, Esquire, a bail commissioner within and for said county, legally authorized and duly qualified to take bail in criminal cases in said county, to be admitted to bail; that upon due hearing and examination it then and there appeared to said Barnard, as such commissioner, that the Municipal Court of the city of Boston had jurisdiction of the charge and offence upon which said Bradley had been so arrested and apprehended as aforesaid, and of the person of said Bradley; and said Bradley was then and there lawfully ordered by said Barnard, as such commissioner, to recognize, with surety in the sum of two hundred dollars, personally to appear before the Municipal Court of the city of Boston, then next to be holden at said Boston, for the transaction of criminal business, on the tenth day of said January at nine of the clock in the forenoon, there to answer to the charge aforesaid, and also in like manner personally to appear at any subsequent time or term of said court, to which the consideration of said charge might by said court be continued, if not previously surrendered or discharged; and so from time to time and term to term until the final decree, sentence or order of said court thereon, and to abide such final decree, sentence or order of said court thereon, and not to depart without leave; that thereafter, to wit, on said eleventh day of said January, and before the expiration of twenty-four hours from the time when said Bradley was so arrested upon the charge and offence as aforesaid, at said Boston, before said Charles A. Barnard, Esquire, a commissioner as aforesaid within and for said county of Suffolk, legally authorized and duly qualified to take bail in criminal cases in said county, one James L. Sargent, of said Boston, offered himself as bail and surety for said Bradley, as required by said order; that said Sargent was then and there lawfully required by said commissioner, pursuant to the course and practice of taking and approving bail, to

make a written statement, under oath, of his, said Sargent's, circumstances and property, the same being material to aid said commissioner in determining whether he would and should take and approve said Sargent as such bail and surety; that said Sargent, being then and there duly sworn by said commissioner to the requirement aforesaid, did then and there, in pursuance of said requirement, make said statement, and did then and there, being so sworn as aforesaid, falsely, wilfully, knowingly and corruptly say, depose and swear in and by said written statement as follows, that is to say: 'Commonwealth of Massachusetts. Suffolk, ss. Before Charles A. Barnard, commissioner to take bail in criminal cases in said county, I, James L. Sargent, of Cambridge, in the county of Middlesex and Commonwealth of Massachusetts, offer myself as surety in the sum of two hundred dollars for Josie Bradley. And I on oath depose and say that I am more than twenty-one years of age; that I reside in Cambridge in the county of Middlesex and Commonwealth aforesaid; that my residence is situated on Union Street in said Cambridge, and is numbered 24 (meaning twenty-four) on said street, and that I have personal estate in said Cambridge; that its value is not less than two thousand dollars; that it consists of five horses and divers carriages and harnesses, three of said horses being kept by me in a stable adjoining my said residence, No. 24 (meaning number twenty-four) Union Street, and two of said horses being kept at a stable in Broadway, all in said Cambridge, and that it is subject to no incumbrance; and that the amount of my debts and liabilities of every kind, absolute and conditional, does not exceed one hundred dollars, and that there are no unsatisfied judgments or executions standing against me, and that I am under no recognizance; that my credit is good, and that I am worth in good property not less than two thousand dollars, over and above all debts, liabilities and lawful claims against me, and all liens, incumbrances and lawful claims upon my property. James L. Sargent.' Whereas, in truth and in fact, said Sargent did not then have personal estate in said Cambridge of the value of not less than two thousand dollars, consisting of five horses and divers carriages and harnesses, and did not then and there own three horses, then being kept by him in a stable adjoining said residence, and did not then keep

any horses in a stable adjoining said residence, and did not then keep or own any horses in any stable on Broadway in said Cambridge, and was not worth in good property not less than two thousand dollars ; all of which he, said Sargent, at the said time when he so deposed and swore as aforesaid, then and there well knew. And so the jurors aforesaid, on their oath aforesaid, do present and say, that said James L. Sargent, on said eleventh day of January, before said Charles A. Barnard, Esquire, then and there having such power and authority as aforesaid, in manner and form aforesaid, did knowingly and wilfully commit wicked and wilful perjury ; against the peace of said Commonwealth and the form of the statute in such case made and provided."

In the Superior Court, before the jury were empanelled, the defendant filed a motion to quash the indictment, for the following reasons: "It sets forth no offence against the law of the land. It sets forth no offence in due form of law. It wants due precision and certainty. It does not allege that the defendant falsely, wilfully, knowingly and corruptly committed the supposed offence. It does not allege that the testimony given by the defendant was material to the issue to which it is supposed to refer. No good and sufficient assignments are therein contained. It does not charge plainly and clearly the false oath, nor the oath itself. It does not allege and specify, with requisite distinctness, the particulars of the supposed false statement or statements." *Dewey, J.* overruled the motion ; and the defendant excepted.

The defendant then pleaded not guilty. At the trial Charles A. Barnard, bail commissioner, testified that, on January 11, 1879, he was called upon late at night by the defendant, to go with him to a police station and bail out one Josie Bradley, who had been arrested that same night ; that on arriving at the station-house he filled out, from the statements made to him by the defendant, in answer to his questions, a printed blank as contained in the indictment ; that after he had filled out the blank, it was read to the defendant, and then signed and sworn to by the defendant ; that he did not swear the defendant prior to the filling out and signing of said statements, to make true answers under oath to such questions as might be put to him

touching his, said Sargent's, circumstances and property; that the only oath administered to the defendant was that above described. The defendant excepted to the admission of evidence that the oath had been administered after the defendant had signed the written statement, and to the admission of all of this evidence and contended that there was a fatal variance between the oath as set forth in the indictment and that proved.

John L. Howard, a police officer of Boston, and other witnesses for the government, testified as to their knowledge and investigations of the residence and property of the defendant, and that there was no such house, or number, or stable, at 24 Union Street, or any stable at the corner of Elm and Broadway, or on Broadway, where the defendant on January 11 stated that he had horses, and that the defendant had no horses in his possession. The government offered no further evidence as to the property described in the said written statement and indictment, or any further evidence on the point of ownership or the value of the property.

After all the evidence for the government was in, the defendant asked the judge to rule that the precise location was not material, and that a falsity in this respect alone would not sustain the charge; that there was no sufficient evidence to be submitted to the jury, or require the defendant to answer, as there were not two sufficient witnesses, or the equivalent thereof, to the falsity of the alleged statements, or the material points of these assignments of perjury. The judge gave the first ruling requested, and declined to give the others, unless the defendant would rest his case.

The defendant then testified that he formerly resided, and still claimed a residence, in Cambridge, at the house of his brother, though for the last year and a half he had lodged and boarded in Boston; that this residence was, in May last, at No. 19 Union Street, afterwards at his brother's house, corner of Elm Street and Hampshire Street, which was but a short distance from Union Street, or the corner of Elm Street and Broadway; that there was a stable connected with both houses, No. 19 Union Street and that on the corner of Elm Street and Hampshire Street; that he and his brother together owned the horses mentioned in the defendant's statement, and kept the same at these

stables; that at the time he made this statement he thought the house was on the corner of Elm Street and Broadway; that he stated his qualified interest in this property to the commissioner; that he did not intend to falsify, and believed his statement to be true; that the same was made in good faith, and under the explanations and qualifying circumstances given to the commissioner; and that he honestly believed the value of the property to be as given.

The defendant was asked by his counsel whether or not he had, a short time prior to this statement, told several persons that he owned or had an interest in the horses, and what it was. The question was objected to, and excluded.

The defendant's brother testified that he and the defendant owned the horses; and there was other evidence that they were kept as the defendant testified, and as to the value of the horses.

The government contended that the defendant did not own any of the property set forth by him, and that, if he did own any portion of it, the portion owned by him was well known to him to be of much less value than stated by him, and that the testimony of the defendant and his brother, that the defendant was a joint owner with his brother of said property, was false; and these questions were argued to the jury.

After the evidence was in, the defendant asked the judge to instruct the jury as follows: "1. That, while it may be according to the practice and not unlawful to take the written statement of the party justifying as bail, there is no law requiring this course to be pursued, and perjury does not consist in the falsity of the written statement, but, on the whole testimony, on the material assignments. 2. That, unless the government proves that the written statement is in substance the defendant's whole testimony on the material assignments, there can be no conviction. 3. That, even if the defendant swore rashly, hastily, inconsiderately and ignorantly, and without any reasonable cause, if he believed his statement to be true, it would not constitute the offence charged, and all this must be weighed from the standpoint of the defendant, and not of the jury; and that there was no evidence of two witnesses, or the equivalent thereof, to warrant a conviction."

The judge declined to give these instructions, but instructed the jury as follows: "If the jury are satisfied, beyond a reasonable doubt, that the defendant wilfully, corruptly and falsely swore to the truth of the material statements as to property set forth in the written statement signed by him, knowing well at the time that the same was untrue, they should convict; and that the evidence should be considered from the standpoint of the defendant, and not that of the jury or court. To convict the defendant, the government must introduce the testimony of two witnesses showing the falsity of the material statements, or of one witness and facts equivalent to the evidence of a second witness.

"If the defendant believed at the time that the property was of great value, the same being in Cambridge, at or near the place described, the precise location not being material, although he may have fixed the value too high by mistake, inadvertency or error of judgment, or carelessly; yet, unless it was so fixed designedly and with a corrupt and wilful intent to mislead the commissioner and induce him to accept the defendant as bail, the jury were not justified in adjudging him guilty. But if the defendant intentionally or recklessly, with gross carelessness, well knowing the value to be much less, placed the value of the property with the said intent at the sum stated, that would be sufficient to convict him of having wilfully, corruptly and falsely sworn to the truth of the statement signed by him, and would warrant their finding him guilty of the crime." Other rulings were given as to the question of ownership, which were not excepted to.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

C. H. Hudson & E. W. Sanborn, for the defendant.

G. Marston, Attorney General, & *F. H. Gillett*, Assistant Attorney General, for the Commonwealth.

ENDICOTT, J. 1. The motion to quash was rightly overruled. The assignment of the falseness of the representation made by the defendant in his sworn statement before the commissioner, that he had personal estate in Cambridge of a value not less than fifteen hundred dollars, consisting of five horses, and divers carriages and harnesses, preceded by the words "whereas in

truth and in fact said Sargent did not," &c., was a good assignment of perjury, and the indictment could not be quashed on the ground that "no good and sufficient assignments are contained therein." Whether the other assignments of the falseness of the defendant's statements, in regard to the places where the horses were kept and the amount of his property, should have been each preceded by the formal words, "whereas in truth and in fact," it is unnecessary to consider. *Commonwealth v. McLaughlin*, 122 Mass. 449. *Commonwealth v. Johns*, 6 Gray, 274. The defendant at the trial contended there was no legal and sufficient assignment, and objected to any evidence in support of any assignment; but as there was a good assignment, evidence was properly admitted. And the defendant did not afterward ask to have the evidence confined to such assignment. See *Wood v. People*, 59 N. Y. 117.

2. In an indictment charging a defendant with making false statements in writing under oath, which are material, it can make no difference that the statements made were reduced to writing and signed before or after the oath was administered. The offence consists in the false statement of material facts, without reference to the mode of statement, whether oral or written. *Commonwealth v. Hatfield*, 107 Mass. 227. *Commonwealth v. Carel*, 105 Mass. 582.

But the defendant contends that this indictment charges that the oath was administered before signing, and the evidence that it was administered afterwards was not admissible, on the ground that matters of description, though unnecessarily set forth, must be proved precisely as alleged.

We do not so read the indictment. It does not allege in terms that the defendant was first sworn, nor that he was sworn to make true answers to such questions as should be put to him, as in *Smith v. People*, 1 Parker C. C. 317, relied on by the defendant, but that he was required to make a written statement under oath of his circumstances and property. The fair meaning of this is, that he was to make a statement in writing to be signed and sworn to by him. The indictment then proceeds to charge, that he, "being then and there duly sworn by said commissioner to the requirement aforesaid, did then and there in pursuance of said requirement make said statement, and did then

and there, being so sworn as aforesaid, falsely, wilfully, knowingly and corruptly say, depose and swear in and by said written statement as follows:" and the statement duly signed is set forth at length. The clause, "being then and there duly sworn to the requirement aforesaid," means simply that he was duly sworn as required. The concluding clause is to be construed in connection with what precedes it, and, after alleging that he made the statement under oath, it alleges that he deposed and swore in and by said statement as follows, that is, that he made the written statement and made oath to it. The charge therefore is, that he made a sworn statement in writing as required, and such a statement could only be furnished after it was made, signed and sworn to.

3. The court was not bound, as matter of law, to rule at the close of the government's case that there was no sufficient evidence to be submitted to the jury, for the reason that there were not two sufficient witnesses, or the equivalent thereof, to the falseness of the defendant's statements. The bill of exceptions states, that John L. Howard, and other witnesses for the government, testified to their knowledge of and investigations in regard to the defendant's residence and property. And the presiding judge stated, in his charge to the jury, that to convict the defendant the testimony of two witnesses, showing the falseness of the material statements, or of one witness and facts equivalent to the evidence of a second witness, was necessary.

4. It was not competent for the defendant to put in his own previous declarations, that he owned or had an interest in the horses. He had already stated what his interest in the horses was, and he could not fortify his own testimony by such declarations. It does not appear that they were made in connection with any act, or were part of the *res gestæ*, as in *Commonwealth v. Rowe*, 105 Mass. 590.

5. The bill of exceptions does not find that the defendant gave any testimony before the commissioner, bearing on the question of his property, except what appears in the written statement set out in the indictment. And the presiding judge was not required to give the second instruction requested, no facts appearing which rendered such an instruction necessary. *Wells v. Prince*, 15 Gray, 562.

6. The third ruling requested was in substance given, and we fail to find that the defendant has any ground of exception to the instructions upon which the case was submitted to the jury.

We have considered all the objections which the defendant presented in his argument before us, and, in the opinion of a majority of the court, the entry must be

Exceptions overruled.

COMMONWEALTH vs. CHARLES BOUTWELL.

Middlesex. June 26, 1879. — July 16, 1880. MORTON & ENDICOTT, JJ.,
absent.

An indictment, under the Gen. Sts. c. 162, § 1, charging the defendant with the forgery of an accountable receipt for money, is sustained by proof that he inserted additional words and figures in a genuine receipt for money, by which the amount originally named therein was increased.

COLT, J. The indictment in the first count charges that the defendant "did falsely make, forge and counterfeit a certain false, forged and counterfeit accountable receipt for money," a copy of which is set forth. The second count is like the first, except that it describes the instrument as a "discharge," instead of a "receipt." The evidence at the trial was, that the defendant inserted additional words and figures in a genuine receipt for money paid to one Buck, by which the amount named in the original receipt was increased from \$50 to \$750.

It is contended that this does not support the charge of forging the whole instrument. But the court properly ruled otherwise. The crime of forgery at common law is defined by Blackstone to be the fraudulent making or alteration of a written instrument to the prejudice of another's right. 4 Bl. Com. 247. It is not necessary to the offence that the whole instrument should be fictitious. A fraudulent insertion of additional words, or an alteration in a material part of a true document, by which another may be defrauded, is a forgery, and is well described as such.

Under the old St. of 5 Eliz. c. 14, against the forgery of deeds and other writings, it is said in 1 Hale P. C. 684, that the

inserting of a clause in a will purporting to devise of lands, without the direction of the deviser, is the forging of a will within this statute, though the whole will be not forged. This is stated in 1 Hawk. c. 70, § 2, to be because the fraud and villany are the same as if there were an entire making of a new instrument in another's name.

In the early case of *Rex v. Dawson*, 1 Stra. 19, the indictment charged that the defendant *fabricavit et contrafecit* a certain bank-note for the payment of money. The jury found by a special verdict that the defendant altered a genuine note for £220 so that it appeared to be a note for £550. The defendant insisted that the facts found by the special verdict were not included in the general words of the indictment "*fabricavit et contrafecit*." But the judges were of opinion that the indictment was well enough, for it was a plain forgery, if not a counterfeit, and *fabricavit* would denote as much. And, under the St. of 7 Geo. II. c. 22, it was decided that altering a bill from a lower to a higher sum was a forgery; and that a person might be indicted for forging such an instrument, although the statute had the word "alter" as well as forge. *Rex v. Teague*, 2 East P. C. 979; *S. C.* Russ. & Ry. 38. *Rex v. Birkett*, Russ. & Ry. 251. *Rex v. Atkinson*, 7 Car. & P. 669. *Regina v. Vaughan*, 8 Car. & P. 276.

A statute of this Commonwealth imposes punishment upon any one who falsely makes, alters, forges or counterfeits certain written instruments therein named. Gen. Sts. c. 162, § 1. When this statute was passed, it had been settled by the law of England under similar statutes that a forgery of the whole instrument and a material alteration of it were not distinct offences, and that the latter act was well charged in criminal proceedings as a forgery of the whole. This state of the law is to be taken into account in the construction of these acts, and in the application of the rules of criminal pleading to offences committed under them. We find several cases in which the English rule has been followed by the courts of this country, but none in which it appears to have been departed from.

In *Commonwealth v. Woods*, 10 Gray, 477, it was held that an indictment for knowingly having in one's possession a false,

forged and counterfeit promissory note was supported by evidence of the possession of a genuine bank-note which had been altered by changing the amount from one dollar to ten. It was said by Mr. Justice Dewey, that, if any part of a true instrument be altered, the indictment may allege it as a forgery of the whole. He added, however, that where the forgery is of a mere addition which has not the effect of altering the instrument itself, but is merely collateral to it, the forgery must be specially alleged. In *Commonwealth v. Butterick*, 100 Mass. 12, 18, it was said to be clear that the averment that the whole instrument has been forged is satisfied by proof of a forgery of any material part; and the statement seems to have been necessary to the decision of the case.

In *State v. Flye*, 26 Maine, 312, the indictment was for forging an order, which was set out as it appeared when altered. The proof was that the order originally drawn for nine dollars was altered to nineteen dollars. The point was distinctly made, that, as the indictment was for forging the order, the defendant could not be convicted on proof of an alteration only. But it was held otherwise. In *State v. Floyd*, 5 Strob. 58, the alteration of a receipt for money, by erasing the word "part" and substituting the words "full up to date," was held to constitute the offence of forgery under the statute of South Carolina, which was borrowed from the St. of 7 Geo. II. c. 22; and, upon a full consideration by the court, in which the English cases above referred to were relied on, it was decided that an indictment alleging a forgery of the whole instrument would be supported by proof of the alteration above stated. See also *State v. Weaver*, 13 Ired. 491; *State v. Maxwell*, 47 Iowa, 454; *State v. Marvels*, 2 Harringt. (Del.) 527.

Whatever objections might have been originally urged against the rule as a violation of sound principles of criminal pleading, the existence of the rule cannot now be treated as an open question. The Constitution of this Commonwealth, with the clause requiring that all crimes shall be fully and plainly, substantially and formally described, was adopted after this rule was fully established, and the constitutional requirement must be interpreted with reference to it. The proof in the case at bar was of a material alteration of a genuine written instrument. The

charge is of the forgery of that instrument, and a majority of the court are of opinion that there is no material variance between the allegation and the proof. *Exceptions overruled.*

W. D. Northend, for the defendant.

F. H. Gillett, Assistant Attorney General, (*G. Marston*, Attorney General, with him,) for the Commonwealth.

CHARLES G. BRECK & another vs. WILLIAM H. H. BLAIR.

Hampden. Sept. 23, 1879. — July 3, 1880. ENDICOTT & LORD, JJ., absent.

The Gen. Sts. c. 123, §§ 87, 88, providing that personal property, which has been attached in a suit against one part-owner, shall, at the request of the other part-owner, be appraised and delivered to him upon his giving bond to the attaching officer, do not apply to an attachment of partnership property in an action against one partner.

TORT. The declaration alleged that the plaintiffs were co-partners with one Robert Breck, and, as such, joint owners with him of a large stock of merchandise, kept and exposed for sale in the store occupied by said firm in Springfield; that on July 18, 1878, the defendant, a deputy sheriff, attached said merchandise in a suit duly commenced against Robert Breck; that the plaintiffs notified the defendant that they were part-owners thereof, and requested him to have the same examined and appraised, and delivered to them upon their giving bond; and that the defendant refused to have the property examined and appraised, but retained possession thereof, claiming the right to do so under the writ against Robert Breck.

At the trial in the Superior Court, *Dewey*, J. directed a verdict for the defendant; and reported for the determination of this court the question whether the Gen. Sts. c. 123, §§ 87, 88, applied to the case of the attachment of partnership property in an action against one partner; judgment to be entered on the verdict, or a new trial granted, as the court might determine.

J. L. Rice, for the plaintiffs.

C. L. Long, for the defendant.

MORTON, J. The only question presented by the report is whether it was the duty of the officer to have the attached property examined and appraised, and to deliver it to the plaintiffs upon their furnishing a sufficient bond, under the Gen. Sts. c. 128, §§ 87, 88.

The statute provides that, "when personal property belonging to two or more persons is attached in a suit against one or more of the part-owners thereof, it shall, upon the request of any others of the part-owners," be examined and appraised, and delivered to the part-owner at whose request it was appraised, upon his giving a sufficient bond "conditioned to restore the same in like good order, or to pay the officer the appraised value of the defendant's share or interest therein, or satisfy all such judgments as may be recovered in the suit in which it is attached, if demanded within the time during which the property would have been held by the respective attachments."

If we assume, as is stated in *Pierce v. Jackson*, 6 Mass. 242, that a creditor of one partner has the right to attach the partnership effects, yet we are of opinion that the statute was not intended to apply to such an attachment.

Its language does not aptly describe partners. It speaks only of "part-owners," a term of common use in the law to denote a class of persons distinct from partners, who own property jointly, but in a different manner and by a different tenure.

The mode of proceeding which it provides is adapted to the case of part-owners, but not to that of partners. The attached property is to be appraised, and then the part-owner at whose request it is appraised is to give a bond, conditioned in one alternative "to pay the officer the appraised value of the defendant's share or interest therein." This provision is practicable in the case where the defendant is a part-owner of the attached property owning a specific share or interest in it, like one half or one quarter. But it is impracticable in the case where he is a partner. Such partner does not own any specific share in the attached property. His interest is a share of the surplus which may remain after discharging all partnership demands upon it. The appraisal of the attached goods (and

no other appraisal is provided or contemplated by the statute) would not fix "the appraised value of the defendant's share or interest therein."

The provision of § 89, that, if such appraised value is paid, the defendant's share of the property shall thereby become pledged to the party to whom it was delivered and he may sell it, tends to show that the Legislature understood it was dealing with the fixed share of a part-owner in the specific property, which might be the subject of a pledge and sale, and not with the indeterminate interest of a partner, which could not properly be pledged.

The statute does not in its terms apply to partners, and we find nothing in its provisions which indicates that the Legislature intended to use the word "part-owners" in a sense different from its ordinary meaning so as to include partners. The ruling of the Superior Court was therefore correct.

Judgment on the verdict.

GEORGE C. WINCHESTER *vs.* ADIN THAYER, Judge of the
Court of Insolvency, & others.

Worcester. June 29. — July 2, 1880. COLT & SOULE, JJ., absent.

The record of a Court of Insolvency, as made up or amended by direction of the judge, cannot be contradicted by parol evidence upon a petition to this court, under the Gen. Sts. c. 118, § 16, to vacate the proceedings.

A person, against whom and his partner proceedings in insolvency have been instituted, cannot avoid them on the ground that his partner was an infant when the proceedings were begun, if the infant was then represented by a guardian *ad litem*, and has ratified the proceedings after coming of age.

If the judge of the Court of Insolvency declines to entertain an application of the petitioning creditor to vacate proceedings in insolvency, because not presented at a regular meeting, and the application is withdrawn, without asking for an order of notice thereon, or giving opportunity to other creditors to come in and prosecute the proceedings, the refusal of the judge affords no ground for this court to vacate the proceedings, under the Gen. Sts. c. 118, § 16.

A judge of the Court of Insolvency should not be joined as a defendant in a bill in equity, under the Gen. Sts. c. 118, § 16, to vacate proceedings in insolvency.

BILL IN EQUITY, under the Gen. Sts. c. 118, § 16, to vacate proceedings in insolvency instituted against George C. Winchester (the plaintiff), William G. Wheildon and Herbert H. Winchester, copartners under the name of George C. Winchester & Co., upon the petition of a creditor. The judge of the Court of Insolvency, the plaintiff's copartners (who had refused to join as plaintiffs) and the assignees in insolvency were made defendants to the bill.

The bill alleged that the petition was presented to the judge of the Court of Insolvency on September 1, 1879, and, after notice to the debtors and the appointment of a guardian *ad litem* for Herbert H. Winchester, a minor, the warrant was issued on September 9, and the first publication thereof made on September 12; that the first meeting of creditors was held on September 23, 1879, and thence adjourned to October 8, and again to October 22, and that there was no further adjournment of that meeting; that on November 18 the plaintiff by his attorney presented to the judge the claim of the petitioning creditor, properly sworn to, for proof, and also a petition of the same creditor to vacate the proceedings, and the judge refused to entertain that petition, because not presented at a regular meeting, and, upon an examination of the record of the case by the judge and the plaintiff's attorney, there appeared to be no record of any adjournment; and therefore no further action was taken until December 9, when, at the request of the petitioning creditor's attorney, a record was made up by the register, under the direction of the judge, so as to show the case to have been adjourned from October 22 to December 17; that the plaintiff had since requested the judge and the register to amend the record so as to conform to the fact in regard to the adjournment, but they had declined to do so; that on December 9 the judge ordered notice to the debtors and to their creditors that an adjourned first meeting would be held on December 17, and on December 17 a like order of notice was made, returnable on January 7, 1880, and both these orders were duly served and returned; and that at the meeting on January 7, the judge, against the protest of the plaintiff, allowed divers claims of supposed creditors to be proved, and assignees to be chosen by the creditors who had proved their claims, and afterwards ordered

the plaintiff to convey his property by a confirmatory deed to the assignees.

The bill also alleged that, at the meeting on January 7, Herbert H. Winchester, then of age, came into court and confirmed, so far as he was able, the proceedings in the case; but that, as at the time of the original petition he was a minor, and remained such until November 29, 1879, any ratification by him could not affect the plaintiff's rights.

The bill further alleged that, between September 8 and December 9, 1879, the debtor and nearly all the creditors whose claims were afterwards proved, together with many other creditors, including the petitioning creditor, executed and delivered an indenture of trust to the trustees named therein, according to the conditions and stipulations therein contained, by which all their claims were to be adjusted, all pending suits and proceedings in insolvency to be discontinued, and all the property of the debtors was conveyed to the trustees, to be applied to the payment of debts; that on November 11 the trustees took, and had since retained, possession thereof; and that the petition to vacate the proceedings in insolvency, presented to the judge on November 18 as aforesaid, was made in accordance with that indenture, and was withdrawn by the petitioner on or about December 9.

The indenture of trust, a copy of which was annexed to the bill, purported to be made on September 8, 1879, between the debtors of the first part, the trustees of the second part, and the several creditors of the debtors, "who shall execute these presents within sixty days from the day of the date hereof, or within such further time, if any, as said parties of the second part shall allow in and by a writing herein signed by them," of the third part; and contained the following proviso: "Provided always, and these presents are upon the express condition, that unless creditors holding claims against said firm of George C. Winchester & Company, or George C. Winchester, amounting in the aggregate to ninety per cent of the total unsecured indebtedness of said firm, and of George C. Winchester individually, made known to and certified by said trustees herein, shall sign these presents within sixty days from the date hereof, or within such further time, if any, as

the party of the second part, or the survivor or survivors of them, shall allow as aforesaid, these presents shall be null and void."

The answers alleged that the first meeting of creditors was adjourned from October 22 to December 17, 1879; that no indenture of trust was ever delivered as a completed and operative instrument; and that Herbert H. Winchester, on December 5, 1879, after coming of age, executed a deed, by which he expressly ratified, confirmed and adopted the partnership, and all the business, contracts, rights and liabilities thereof, as fully as if the same had been transacted, made, acquired and incurred when he was of full age. The plaintiff filed a general replication.

At the hearing upon the pleadings and proofs, before *Endicott, J.*, the plaintiff offered to prove that there was no adjournment of the first meeting from October 22 to December 17, and that all the proceedings after October 22 were carried on without any legal adjournment of the first meeting. But the judge ruled that evidence to contradict the record of the Court of Insolvency was not admissible.

The statements of fact in the bill and answers, so far as they related to the minority of Herbert H. Winchester, his confirmation of the partnership and its contracts, and his ratification of the proceedings in insolvency, were admitted by all parties to be true. The judge ruled that his minority at the commencement of the proceedings in insolvency would not render those proceedings void, he having subsequently, on attaining his majority, confirmed the partnership and its contracts, and adopted and assented to the proceedings in insolvency.

The plaintiff offered to prove the due execution of the indenture of trust; that it was executed by ninety per cent of the unsecured creditors of the debtors, and that this was made known to the trustees within the time named therein; that it was delivered to the trustees, and they took possession of the property therein described; but that the trustees never certified to the fact that ninety per cent of the creditors had so executed it. The judge ruled that this evidence would not entitle the plaintiff to the relief prayed for.

The judge was of opinion that the bill should be dismissed, but, at the request of the parties, reported the case for the consideration of the full court. If the rulings were erroneous, the case was to stand for hearing; if they were correct, the bill was to be dismissed, with costs.

D. H. Merriam, for the plaintiff.

S. Hoar, (*E. R. Hoar* with him,) for the defendants.

GRAY, C. J. This bill is filed under the Gen. Sts. c. 118, § 16, by which it is enacted that this court "shall have a general superintendence and jurisdiction of all cases arising under this chapter; and, except when special provision is otherwise made, may, upon the bill, petition, or other proper process, of any party aggrieved, hear and determine the case as a court of equity."

1. The Court of Insolvency is a court of record, and as such has power to amend its own records, and the record as made up or amended by direction of the judge is conclusive evidence of the doings of the court; and parol evidence is inadmissible, even in a court authorized to review its decisions by appeal or otherwise, to contradict the record. The plaintiff cannot therefore be permitted to show that the first meeting was not adjourned from October 22 to December 17, as stated in the record of the Court of Insolvency. Gen. Sts. c. 118, §§ 1, 6. *Dearborn v. Ames*, 8 Gray, 1. *Batty v. Fitch*, 11 Gray, 184. *Marsh v. McKenzie*, 99 Mass. 64. *Leigh v. Arnold*, 5 Cush. 615.

2. It has not been decided in this Commonwealth whether an infant is subject to proceedings under the insolvent laws. *Butler v. Breck*, 7 Met. 164. *Farris v. Richardson*, 6 Allen, 118. But when in such proceedings, instituted by a creditor of a partnership of which he is a member, he has been represented by a guardian *ad litem*, and after coming of age has expressly ratified the partnership and the proceedings, it is difficult to see how he could afterwards avoid them. *Hill v. Keyes*, 10 Allen, 258. And even if he could avoid the proceedings so far as he is concerned, it is quite clear that his copartners, who were of full age when the proceedings were instituted, cannot.

3. When, as in this case, the general supervisory jurisdiction of this court under the Gen. Sts. c. 118, § 16, is invoked

by bill or petition in equity to revise the doings of the Court of Insolvency, the suit in this court, though it is not technically an appeal, and does not of itself vacate or stay the proceedings in the court below, yet is, as was commonly said by Chief Justice Shaw, a petition in the nature of an appeal, and its purpose is to review and correct the decisions of the Court of Insolvency. *Eastman v. Foster*, 8 Met. 19, 23. *Barnard v. Eaton*, 2 Cush. 294, 300-302. *Harlow v. Tufts*, 4 Cush. 448, 451. *Lancaster v. Choate*, 5 Allen, 530. *Hall v. Marsh*, 11 Allen, 563, 565.

The Court of Insolvency had power, upon the application of a creditor who had proved his debt, and after notice to all persons interested, to vacate the proceedings, if no objection was made by the debtor or by any such creditor; but pending an adjournment the judge could not do more than issue an order of notice on such an application, and he was not required to do that. Gen. Sts. c. 118, §§ 4, 130. The bill in this case shows that the judge refused to entertain the application to vacate the proceedings because it was not presented at a regular meeting, and that before the day arrived to which the meeting stood adjourned that application was withdrawn. If it had been pressed to a hearing, other creditors, at least those who had not executed the indenture, would have had the right to come in and prosecute the proceedings in insolvency. *Foster v. Goulding*, 9 Gray, 50.

For this reason, the evidence offered concerning the indenture of trust did not entitle the plaintiff to the relief prayed for, independently of the question argued at the bar, and upon which we express no opinion, as to the effect of the want of a certificate by the trustees that the indenture had been executed by the requisite proportion of creditors to make it operative.

4. The practice, which has prevailed to some extent, and which, not being objected to, has been allowed to pass *sub silentio* in several reported cases, of making the judge of the Court of Insolvency a defendant in such suit in equity, is irregular, and unsupported by any precedent or analogy in equity pleading. It perhaps had its origin in the fact that in the early years of the insolvent law the application to this court

was often in the form of a petition for a writ of mandamus or of prohibition, on the common-law side of the court, in which the magistrate or tribunal whose action is sought to be controlled or restrained is properly made respondent. *Kimball v. Morris*, 2 Met. 578. *Randall v. Barton*, 6 Met. 518. *Gilbert v. Hebard*, 8 Met. 129. *Agawam Bank v. Morris*, 4 Cush. 99, 102. *Connecticut River Railroad v. County Commissioners*, 127 Mass. 50, 59 *ad fin.*

This court, in the exercise of its supervisory jurisdiction in equity under the insolvent laws, may doubtless, by interlocutory order or final decree, give such directions to the judge of the Court of Insolvency as the rights of the parties in interest may require. But it is unnecessary for that purpose, and is wholly inconsistent with the principles of equity jurisdiction and practice, that the judge of an inferior court whose proceedings are brought in review should himself be made a party defendant, and be thereby put to the inconvenience of appearing and answering in a cause in the determination of which he has no personal interest.

Bill dismissed, with costs.

WILLIAM D. GIFFORD vs. INHABITANTS OF DARTMOUTH.
WILLIAM POTTER, 2d, vs. SAME.

Bristol. Oct. 29, 1879. — July 1, 1880. COLT & AMES, JJ., absent.

A landowner, who has applied, under the St. of 1873, c. 261, to the Superior Court for a jury to assess his damages sustained by a change of grade of a highway, and has obtained a verdict in his favor, is not entitled to costs.

TWO PETITIONS to the Superior Court, under the St. of 1873, c. 261, each for a jury to assess the damages caused to the petitioner's estate by reason of the lowering of the grade of a highway in the respondent town, the selectmen having made no adjudication of the damages on petitions duly filed with them. The jury returned a verdict for the petitioner in the first case in the sum of \$45, and for the petitioner in the second case in the

sum of \$30. The clerk taxed costs to each petitioner, against the objection of the respondent; *Brigham*, C. J. affirmed the taxation; and the respondent alleged exceptions.

T. M. Stetson, for the respondent.

G. Marston, for the petitioners, contended that, inasmuch as the St. of 1873, c. 261, provided that a petition under that act should be tried "in the same manner as other civil cases" are tried, the case came within the Gen. Sts. c. 156, § 1, which provides that, "in all civil actions, the prevailing party shall recover his costs, except in those cases in which a different provision is made by law."

Soule, J. A landowner aggrieved by the estimate made by the selectmen of the damages sustained by him by reason of the raising or lowering of a highway or town way, or by the neglect or refusal to estimate the same, may apply for a jury to have his damages ascertained in the manner provided where land is taken in laying out highways. Gen. Sts. c. 44, § 20. The jury thus applied for was formerly ordered by the county commissioners. Gen. Sts. c. 43, § 19. St. 1870, c. 75. By the St. of 1873, c. 261, it is provided that the application for a jury may be made to the Superior Court, and that the trial may be had at the bar of that court.

The petitioners in the cases at bar, having failed to obtain any estimates of their respective damages from the selectmen of the defendant town, applied to the Superior Court for a trial by jury, and obtained verdicts in their favor. Thereupon the clerk of the Superior Court taxed costs for the petitioners, and, the taxation having been affirmed by that court on appeal, the respondent excepts to the ruling of the Superior Court.

It is well settled that proceedings of this nature are not within the statute provision giving costs to the party prevailing in civil actions. *Commonwealth v. Carpenter*, 3 Mass. 268. *Hampshire & Hampden Canal Co. v. Ashley*, 15 Pick. 496. *Williams v. Taunton*, 126 Mass. 287. If, therefore, the petitioners are entitled to costs, it must be by virtue of some special provision of statute relating to this class of proceedings. The petitioners have failed to point out any such provision, and do not cite any case in which it has been decided that costs are recoverable by

the landowner against the town. The statutes make no provision for costs between the parties. The only direct provision for payment of costs in these cases is one for the protection of the county from loss, when the county commissioners order the jury; in which case the petitioner recognizes to the county for the payment of costs and expenses incurred by the county. But these costs and expenses are not the costs of the parties to the controversy, and are a class of expenses which do not arise where, as in the cases at bar, the application for a jury is made to the Superior Court. *Williams v. Taunton, ubi supra*. Gen. Sts. c. 43, § 24. This provision has come down, with some modifications of its language, from the statute by which the court of sessions was abolished and county commissioners were established. St. 1827, c. 77. From an examination of that statute it is perfectly clear that no recovery of costs between parties was contemplated. Section 11 provides that "no petition for the laying out, alteration or discontinuance of any highway or common road, or for a jury in relation thereto, or in consequence thereof, shall be proceeded upon by the county commissioners of any county, until the petitioner or petitioners shall cause a sufficient recognizance to be given to the county, with such surety as the said commissioners shall accept, to pay all the costs made in pursuance thereof, in case such petition shall not prevail. And in case such highway or road shall be finally laid out and established, altered or discontinued, all the expenses of the commissioners and of the view, and of the laying out or alteration, and all damages allowed for the laying out, alteration or discontinuance shall be paid out of the county treasury. And in case said highway or road shall not be finally laid out and established, altered or discontinued, all the said expenses shall be paid by the person or persons recognizing therefor as aforesaid." This language specifies the kind of expenses which the individual asking for the laying out of a highway, or for a jury to assess damages, exposes himself to being called on to pay on his recognizance for costs. Section 12 provides that, when a jury "shall not alter said way or increase the damages, the cost incurred in pursuance thereof shall be paid in the same way as is provided in the eleventh section of this act, by the person or persons recognizing therefor as aforesaid." This plainly means

that the costs to be paid by the party are the expenses incurred by the county commissioners under the petition for a jury, and as security for the payment of which the recognizance was entered into.

In addition to the provision above cited from the General Statutes, is the provision of § 57 of the same chapter, that where several landowners become parties to the proceedings on the petition of one, and have their damages determined by the same jury, each party recovering damages shall recover his costs; and each party not recovering his damages shall be liable for costs to the town or other corporation of which he shall have claimed damages, in like manner as if the proceedings were under his several petition. This section does not establish any new and independent right to costs, but merely gives the same rights and imposes the same liabilities when the claimants join, which each would have had and would have been under if he had proceeded alone,—the word “costs” referring to the same class of expenses as in the other section.

It is not necessary that we should consider here the reasons which may have operated on the Legislature to maintain silence on the subject of costs between the parties to the controversy in matters of this kind. They are somewhat discussed by the court in the cases cited at the beginning of this opinion.

As no statute gives costs to the petitioners in cases of this nature, the judgments of the Superior Court for costs against the respondent were erroneous, and must be set aside.*

Exceptions sustained.

* The St. of 1881, c. 122, is as follows: “In all cases where an award has been made and either party makes application for a jury to the Superior Court under the provisions of chapter two hundred and sixty-one of the acts of the year eighteen hundred and seventy-three, if upon trial damages are increased beyond the award, the party in whose favor the award was made shall recover his costs; otherwise he shall pay costs; and costs shall be taxed as in civil cases.”

LEONARD A. STEARNS vs. DAVID DEAN.

Bristol. Oct. 28, 1879. — July 8, 1880. COLT & AMES, JJ., absent.

In an action against an officer for the attachment of the plaintiff's goods on a writ against a third person, there was evidence that the officer went to a carrier, in whose custody the goods were, and told him he had come to attach the goods; that, on the carrier refusing to deliver the goods to any one until the freight was paid, the officer went away; that afterwards, on being told that the goods belonged to the plaintiff, he said nothing except to refer his informant to the attorney who made the writ; and that his return on the writ stated that he had attached the goods. *Held*, that the defendant had no ground of exception to a refusal to rule that there was no evidence of an attachment.

An officer who has attached the property of one person on a writ against another person, cannot set up, in bar of an action of trover against him by the owner, that the property when attached was in the possession of a carrier who had a lien upon it for freight.

TORT against a deputy sheriff, for the conversion of a quantity of hay. The answer contained a general denial; and alleged that the defendant, under a writ against George R. Carpenter, attached the hay as the property of Carpenter. Trial in the Superior Court, before *Rockwell, J.*, who allowed a bill of exceptions in substance as follows:

The plaintiff introduced evidence tending to show that he shipped the hay from Boston to Carpenter, at Taunton, to be sold by the latter on the plaintiff's account; that the hay arrived in Taunton on cars of the Old Colony Railroad Company; and while on the cars, and after a part had been taken away by Carpenter's order, the defendant, on February 18, 1878, went to the railroad depot in Taunton, with a writ against Carpenter, saw the hay, and told the agent of the railroad company that he had come with a writ to attach it. The agent testified that he told the defendant that the railroad claimed a lien on the hay for freight; and that he should not deliver the hay to any body until the freight was paid.

The hay was removed by the railroad company from the cars to their depot, and has remained there ever since. The freight money has never been paid.

The defendant contended that the plaintiff sold the hay to Carpenter, and testified that he did not tell any person to refuse to deliver the hay; that he did not take the hay at the

time he went to make the attachment, or undertake to remove it or order it to be removed; that he did not appoint a keeper of the hay, nor file a copy of the writ in the city clerk's office in accordance with the Gen. Sts. c. 123, § 57; that he had not seen the hay since it was on board the cars, and had not given instructions to anybody since that time in regard to it; and that it was not stored in the depot at his request.

Carpenter testified that, on February 18, after the transaction herein related, he saw the defendant and told him the hay belonged to another person, and a week later showed him letters from the plaintiff to the effect that the hay was the plaintiff's; and that the defendant said nothing, but referred him to the attorney who gave him the writ against Carpenter.

The defendant's return in the writ against Carpenter stated that he had, on February 18, "attached as the property of the said Carpenter about eight tons of hay;" and the defendant testified that this was the hay in question.

The defendant asked the judge to rule that the plaintiff could not recover; that, if the Railroad Company had a lien on the hay for freight and was holding it under that lien, the company was the only party entitled to the immediate possession of the hay until the freight money was paid; and that the plaintiff had shown no such possession or right to the immediate possession of the hay as would entitle him to recover in this form of action.

The judge declined so to rule; and gave full instructions to the jury, which were not excepted to, as to what taking or possession would constitute an attachment by the defendant; that the defendant would not be liable, unless he had taken the hay into his possession actually or constructively by attachment; that the jury must be satisfied that the hay belonged to the plaintiff, and that he was deprived of the possession of it by the act of the defendant in attaching it, and was refused by some one acting under the authority or sanction of the defendant; and, against the objection of the defendant, further ruled that, if these facts were proved, the defendant would be liable, notwithstanding the freight had not been paid and a lien therefor was claimed by the railroad company.

The defendant also asked the judge to give the following instructions: "1. The railroad company would have a lien upon the hay provided the freight money was not paid, and if the freight money was not paid at the time this action was brought, the plaintiff had no such possession of this hay or right to the immediate possession of it as would enable him to recover. 2. If the railroad company had a lien on this hay because the freight money had not been paid at the time the officer went to make the attachment, nothing shown to have been done by the officer in this case was such an attachment and seizure of the hay as would amount to a conversion. 3. No legal attachment of this hay could be made while the railroad company held possession of it under a lien. 4. If the defendant had no possession of the property at the time the demand of the plaintiff was made, and the hay was so situated that the plaintiff could have legally taken it, without asking the defendant, by paying the railroad company the freight due, there was no conversion, and the plaintiff cannot recover."

The judge declined so to rule; the jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

S. M. Thomas, for the defendant.

W. H. Fox, for the plaintiff.

MORTON, J. Under the instructions given, we must assume that the jury have properly found that the hay in question was the property of the plaintiff, and that the defendant attached it as the property of Carpenter. The defendant contends that there was not sufficient evidence to justify the finding that he attached and assumed dominion over the hay. This was purely a question of fact for the jury. There was evidence that the defendant, on February 18, 1878, went to the premises of the railroad company where the hay was, and told its agent that he had come with a writ to attach it; that when afterwards notified that the hay belonged to the plaintiff, and not to Carpenter, he did not disavow the attachment, but referred his informant to the attorney who made the writ against Carpenter; and that, in his return of the writ against Carpenter, he stated that he had, on February 18, 1878, "attached as the property of Carpenter about eight tons of hay." The presiding justice properly submitted this evidence to the jury, which the bill of exceptions

states he did with full instructions not excepted to. Under these instructions, it was for the jury, upon this and such other evidence as was introduced bearing upon the question, to determine whether the defendant had attached the hay and deprived the plaintiff of his dominion over it.

The defendant also contends that the plaintiff cannot maintain this action, because at the time he attached the hay the railroad company had a lien upon it for freight, and therefore the plaintiff had not the right of possession. But an officer may attach property subject to a lien in like manner as if it were unincumbered, upon the condition that the attachment is to be dissolved and he is to restore the property to the holder if the amount for which it is liable is not paid by the attaching creditor within ten days after the same is demanded. Gen. Sts. c. 123, §§ 62, 63. The effect of such attachment is to defeat or suspend the lien, and the officer cannot set up, as a defence to the claim of the general owner of the property taken by the attachment, that it was subject to a lien. The lien for freight is the personal privilege of the carrier; if he waives or loses it, no one can set it up against the owner. *Holly v. Huggeford*, 8 Pick. 73. *Ames v. Palmer*, 42 Maine, 197.

For the purposes of this case, it must be assumed that the defendant made an effectual attachment of the hay in question. If he has paid or became liable to pay the freight, the proper mode to avail himself of this fact was in reduction of damages, but he cannot set up the lien to defeat the right of the plaintiff, the general owner, to possession.

It follows that the Superior Court properly refused the several instructions requested by the defendant as to the effect of the lien in favor of the railroad company.

Exceptions overruled.

CHARLES H. DENNIE vs. LEBBEUS W. SMITH & others.

Suffolk. March 3. — July 1, 1880. ENDICOTT & SOULE, JJ., absent.

The refusal of a constable to restore attached property to the owner, upon the termination of the action in the latter's favor, is a breach of the condition of his official bond that he shall "faithfully perform all the duties of a constable in the service of all civil processes which may be committed to him;" a judgment against him for the conversion of the property is conclusive upon him and his sureties in an action on the bond; and it is immaterial that, in the action against him, he is not described in his official capacity.

CONTRACT by the treasurer of the city of Boston, for the benefit of John Hamilton, upon a constable's bond, executed by Lebbeus W. Smith as principal, and by the other defendants as sureties, and containing the condition that Smith should "faithfully perform all the duties of a constable in the service of all civil processes which may be committed to him."

At the trial in the Superior Court, before *Wilkinson, J.*, it appeared that, in February 1876, a schooner belonging to Hamilton was attached by Smith, then a constable, on a writ in which Hamilton and others were named as defendants; that the attachment and the officer's return were regular and valid; that after the entry of the writ in court the action was discontinued as against Hamilton, who thereupon made a demand upon Smith for the surrender of the vessel; that, Smith not complying with the demand, Hamilton brought an action against him for the conversion of the vessel, the declaration in which did not describe him as a constable, and recovered judgment for the sum of \$786.39; and that payment of the execution issued on said judgment was duly demanded of Smith, and this action was brought more than sixty days from the issuing thereof.

The defendant contended, and requested the judge to rule, that this evidence did not show that Hamilton had ever recovered any judgment against Smith as a constable, or for any such official misconduct as would sustain an action on his bond.

The judge declined so to rule; and ruled that the words "service of all civil processes," as used in the Gen. Sts. c. 18, § 61, include not only the attachment of property and the due return of the writ, but also the subsequent disposition of the property

by the officer ; that if, after the discontinuance against Hamilton in the action in which the attachment was made, Hamilton demanded of Smith the surrender of the vessel, and Smith refused or neglected to comply with such demand, such refusal or neglect constituted a breach of the condition of the bond declared on ; and that the judgment recovered against Smith for the conversion of the vessel by such refusal or neglect was sufficient to sustain this action.

The jury returned a verdict for the plaintiff for the penal sum of the bond ; and the defendants alleged exceptions.

G. H. Kingsbury, for the defendants.

J. D. Thomson, for the plaintiff, was not called upon.

AMES, J. We find no error in the rulings of the presiding judge. Upon making the attachment, it was the official duty of the constable to retain possession of the property, to await the result of the suit, and, upon the termination of the suit in favor of the original defendant, to return it to him. His failure to do so was a breach of his official duty. It was therefore a violation of the condition of his bond. It is immaterial that, in the suit against the constable, the declaration does not in terms describe him as holding that office.

The conclusiveness of the former judgment, both as to principal and sureties, in a suit against them upon their joint bond, is distinctly settled in *Tracy v. Goodwin*, 5 Allen, 409. In *Boston v. Moore*, 3 Allen, 126, cited by the defendants, the alleged misconduct of the officer consisted in not accounting for money paid to him by the debtor in settlement of the claim sued ; a neglect which the court held not to be a violation of official duty.

Exceptions overruled.

JOHN V. ROBBINS vs. WILLIAM R. CLARK.

Suffolk. March 10. — July 1, 1880. ENDICOTT & SOULE, JJ., absent.

If a person agrees with another to pay for an article if it accomplishes a particular result, the test to be made by a third person, the decision of the latter is in the nature of an award, and evidence is inadmissible to show that his decision was erroneous.

CONTRACT upon an account annexed for the price of a lot of "spiral economizers" placed in the defendant's boiler.

Trial in the Superior Court, without a jury, before *Rockwell, J.*, who found as facts that the parties contracted that the plaintiff should put his "spirals" into the defendant's boiler; that a test trial should be made, two days with the spirals in the boiler, and two days with them not in; that if the test trial showed that the spirals made a saving of as much as twelve per cent in the fuel consumed, the defendant should pay the agreed price; and that this trial was to be and was made by the defendant's engineer, and showed a saving of more than twelve per cent. The defendant called an expert; and offered to prove by him that at other times he had made experiments with such "spirals" in boilers, and that they were not capable under any circumstances of making any saving whatever. The plaintiff objected to this testimony; and it was excluded.

The judge found for the plaintiff; and the defendant alleged exceptions to the exclusion of the evidence offered.

G. H. Towle, for the defendant.

E. Avery & G. M. Hobbs, for the plaintiff.

AMES, J. It appears upon the facts reported that the articles which the plaintiff had furnished were recommended on the ground that they would make a saving in the fuel consumed of as much as twelve per cent. The question whether they would do so was agreed to be left to be decided upon actual experiment by the defendant's engineer. It is reported as a fact found by the court, sitting without a jury, that the experiment was tried by the engineer, and showed a saving exceeding twelve per cent. His decision was rendered accordingly, and is to be considered as the award of a referee under a submission to arbitration. In the absence of any suggestion of fraud, this award cannot be impeached on the ground of any error in judgment on

his part, in drawing conclusions from the evidence before him. The case falls within the rule laid down in *Palmer v. Clark*, 106 Mass. 373, 389, and *Flint v. Gibson*, 106 Mass. 391.

Exceptions overruled.

HANNAH M. COOLIDGE vs. SAMUEL N. NEAT.

Suffolk. March 12. — July 1, 1880. ENDICOTT & SOULE, JJ., absent.

It is no defence to an action for breach of a contract to marry, that the defendant broke the contract because he felt that the proposed marriage would not tend to the happiness of both parties.

In an action by a woman for breach of a promise of marriage, the judge instructed the jury that, in estimating the damages, they might take into consideration the money value or worldly advantage of a marriage which would have given her a permanent home and an advantageous establishment, the wound and injury to her affections, whatever mortification or distress of mind she suffered resulting from the defendant's refusal to perform his promise, and, in this connection, the length of time during which the engagement had subsisted. *Held*, that the defendant had no ground of exception.

CONTRACT for breach of a promise of marriage. Trial in the Superior Court, before *Putnam*, J., who allowed a bill of exceptions in substance as follows :

The plaintiff put in evidence tending to prove that, in May 1875, she and the defendant mutually promised to marry each other ; that she went to the expense of preparing certain articles of underclothing, in preparation for their marriage ; and that the defendant's attentions continued up to September 2, 1878, when he suddenly ceased his visits to her, became engaged to another woman about the last of September or first of October, to whom he was married in February 1879.

The defendant admitted the engagement and the breach of it on his part, and his marriage to another woman ; that the plaintiff had always treated him kindly and affectionately ; and that their relations were all proper, and he had no fault to find with her conduct. He also testified that, long before he left her, he made up his mind that he could not be happy with her ; that he ceased to regard her with affection, and finally left her, thinking that it would be for the happiness of both of them that they

should separate ; that he had on one or two occasions told her of this, and that she must expect him to leave her at some time ; but that she would not listen to it, and never assented that he might do so.

The plaintiff contradicted this, denying that he ever so informed her ; and testified that his relations continued intimate with her up to the evening of the day when he ceased to visit her ; and that they parted on that evening in the same affectionate manner as before, with no intimation from him or expectation on her part that the acquaintance was to be broken off ; and that, after he left her, her health was seriously impaired, so that she was unable to attend to her daily occupation for some weeks.

The defendant asked the judge to rule as follows : " 1. An agreement to marry is not a marriage contract, but an agreement to make thereafter that contract. 2. The engagement or promise to marry is always on the implied understanding and condition that if, at any time before marriage, either party finds that consummation of the promise will tend to the unhappiness of both, then such party has the power to abrogate the agreement or promise. 3. If an engagement to marry is entered into upon the assumption that such marriage will tend to the happiness of both parties, and it afterward appears that such marriage will not have that tendency, but a contrary one, then it is not the contract contemplated, and neither party is bound by it. 4. Public policy will not permit the enforcement of an engagement to marry founded on a mistake of facts, when it appears that such enforcement must end only in proceedings for divorce. 5. When one who has entered into an engagement to marry finds that he cannot, in good faith, take upon himself the marriage vow and covenant, it is his duty to make it known, and decline to enter into that covenant, and no damage can be recovered against him for so declining. 6. If the jury believe the testimony of the defendant, that he ceased to care for, or regard with affection, the plaintiff, and believe therefore that, from the absence of such regard, the union of the parties for life, by marriage, would not have resulted in the happiness or advantage of the plaintiff, but only in unhappiness, she will be entitled to no damages from the defendant for his failure to

perform an agreement to marry. 7. This is an action for damages for not marrying, and if it was not his duty to marry, no damage can be recovered against the defendant for not marrying. 8. That if it is clear that it was his duty to break off the engagement, then no damage can be recovered against him for the performance of that duty."

The judge gave the first instruction requested, and also the second and third, with this addition to each: "Subject only to indemnifying the other party for such loss or injury as he or she may have sustained by reason of such abrogation." In place of the fourth request, the judge gave this ruling: "The law will not enforce such a contract, or compel the party to marry under such circumstances." The judge gave the fifth request, except the words, "and no damage can be recovered against him for so declining."

The judge also further instructed the jury as follows: "An engagement of marriage, between two persons of suitable age to contract, is founded on a meritorious consideration, and can be enforced to this extent, that if the contract is broken by either party without the fault or consent of the other, that other may secure such damages as he or she can show to be the consequences of such breach. There is no power to enforce the performance of the contract, or to compel one party to marry the other. If one of the parties feels that it is more for his or her happiness to break the contract and marry another person, he or she is at liberty to do so; but if, by so doing, he or she occasions damage, loss or injury to the other party, recompense must be made to that other party to the extent of the loss and injury thus occasioned. It might be possibly a wise thing for the party, under such circumstances, to break it, and possibly his duty, morally, to do so, but he has broken his contract, and must respond in damages. Such a contract may be broken in such a way that no damages can be recovered. The parties may mutually release each other. If it is broken on account of fraud or deception practised by one upon the other, damages cannot be recovered by the party who has practised such fraud or deception; one party cannot break it without the fault and consent of the other, merely because he feels that he cannot make the other party happy, or that the other party will be unhappy;

and this only affects the question as to the extent of the loss or injury which the other has sustained."

Upon the question of damages, the judge instructed the jury that they were to be computed on the principle of indemnity and reasonable compensation; that, as elements of damage, the jury would have the right to consider: 1. The disappointment of the plaintiff's reasonable expectations, and to inquire what she had lost by reason of such disappointment, and, for that purpose, to consider, among other things, what would be the money value, or worldly advantage, of a marriage which would have given her a permanent home and an advantageous establishment. 2. The wound and injury to her affections. 3. Whatever mortification or distress of mind she suffered, resulting from the refusal of the defendant to fulfil his promise. That, in connection with the question how far she had been wounded in her affections or suffered mortification or distress, the jury might consider the length of time during which the engagement had subsisted; that if a female had been wantonly deserted, after an engagement of this kind, public policy as well as justice dictated the propriety of a legal indemnity, and if her affections had been deeply implanted, her wounded spirit, the disgrace, the insult to her feelings, the probable solitude which might result by reason of such desertion, after a long courtship, were all matters for their consideration.

At the defendant's request the judge also gave the following instruction: "It cannot be assumed that the defendant, by associating with the plaintiff, prevented her from forming any other marriage alliance or engagement to marry. The plaintiff might have had no other opportunity for marriage, and the defendant cannot be held responsible for merely possible damage."

The jury returned a verdict for the plaintiff in the sum of \$3000; and the defendant alleged exceptions.

S. J. Thomas, for the defendant.

H. G. Allen, for the plaintiff, was not called upon.

AMES, J. The instructions given to the jury were carefully guarded, and appear to have been in exact conformity with the well-established rule in cases of this kind. The rulings requested by the defendant assume that he would have the right, without the consent of the other party to the contract, to break

off the engagement, without the liability to make any compensation or indemnity, if he should come to the conclusion that the proposed marriage would not tend to the happiness of both parties. This proposition is equivalent to saying that the defendant has the right to recede from the contract, if he should be disinclined to fulfil it. The instructions requested were therefore properly refused, in the form in which they were presented; and, so far as they were given, they were suitably qualified.

The rule of damages, as given by the judge, was in conformity to repeated decisions of this court in similar cases. *Boynston v. Kellogg*, 3 Mass. 189. *Wightman v. Coates*, 15 Mass. 1. *Harrison v. Swift*, 18 Allen, 144. *Grant v. Willey*, 101 Mass. 356. At the request of the defendant, the jury were cautioned not to assume that the plaintiff's association with the defendant had prevented her from forming any other marriage alliance or engagement.

Exceptions overruled.



PERCIVAL L. EVERETT *vs.* IRA T. DREW & others.

Suffolk. March 11. — July 1, 1880. ENDICOTT & SOULE, JJ., absent.

If a person, acting as trustee for others, makes a contract in his own name, his *cestuis que trust* are not liable thereon, although the fact that he is a trustee is not known to the person with whom he makes the contract at the time it is made.

If a declaration alleges that a contract was made by A., as agent for the defendant, and sets forth facts which show that A. was not an agent, a demurrer to the declaration does not admit the fact of agency.

MORTON, J. This is an action of contract, and the substantial allegations of the plaintiff's declaration are, that the defendants made an arrangement with Elijah C. Drew that he was to buy a parcel of land, to take the deed in his own name, and to execute a declaration that he held it in trust for the defendants, to pay a part of the consideration with money furnished by the defendants, and to give his own note and mortgage back for the balance thereof. The declaration also alleges that Drew

purchased land of the plaintiff's wife and other persons; that he paid therefor \$10,000 with money furnished by the defendants; that the owners made a deed to him, and he, at their request, gave his note and a mortgage containing a power of sale to the plaintiff; that the plaintiff foreclosed said mortgage by a sale; that, after applying the proceeds of the sale, there remains a balance due on said note; and that the defendants owe the plaintiff the said balance and the interest thereon.

The plaintiff contends that Drew throughout the transaction and in giving the note acted as the agent of the defendants, and that, as the note is not a negotiable promissory note, he has the right to maintain an action on it against them as unknown and undisclosed principals.

The general rule is well established that if an agent, acting for his principal, makes a contract without disclosing his principal, the latter is bound by the contract. *Thomson v. Davenport*, 2 Smith Lead. Cas. (5th Am. ed.) 358, and cases cited. He is bound because it is his contract made through another person. But this rule does not apply in the case at bar. Drew was not the agent of the defendants. He was not authorized to, and did not in fact, make any contract for and on behalf of them. He bought the land and took the title, he gave the note and the mortgage, in his own name and for his own behalf as trustee. The relations between him and the defendants were not those of agent and principal, but of trustee and *cestuis que trust*. Such a relation is lawful, and, in the absence of fraud, does not render the *cestuis que trust* liable to suits at law upon contracts made by the trustee in his own name.

It is true that the declaration alleges that Drew was the agent of the defendants. But it also alleges the specific facts which show the relations between the parties, and those facts show that he was not an agent. The allegations that he was an agent must be regarded as mere allegations of a conclusion of law which are not sustained by the facts. The defendants' demurrer was therefore rightly sustained. *Exceptions overruled.*

M. Williams & C. A. Williams, for the plaintiff.

C. T. Russell & I. T. Drew, for the defendants, were not called upon.

ROBERT L. FRAMPTON, administrator, *vs.* ANDREAS BLUME,
administrator.

Suffolk. March 15. — July 1, 1880. ENDICOTT & SOULE, JJ., absent.

A testatrix, whose property consisted principally of land, devised to one of her three daughters, "her heirs and assigns," one third of the residue of her estate, "provided, however, that there shall be set apart from her share" a certain legacy to each of her children, to be kept at interest "until the youngest child becomes twenty-one years of age, the interest meanwhile to be paid to said legatees specifically." The will contained similar provisions for the other daughters and their children. *Held*, that the legacies to the grandchildren were a charge upon each parent's share; and that an action would not lie against the executor therefor.

CONTRACT, by the administrator of the estate of Adelaide Frampton against the administrator *de bonis non* with the will annexed of Ruth Bates, for the amount of a legacy bequeathed to the plaintiff's intestate by said will. Writ dated June 16, 1879. The case was submitted to the Superior Court on the following agreed facts:

Ruth Bates died on May 15, 1869, leaving a will dated November 22, 1864, which was duly admitted to probate, and contained the following provisions:

"First. It is my will that all my just debts be paid as soon as may be after my decease.

"Second. To my beloved daughter, Ellen P. Noble, the wife of William Oscar Noble, I bequeath a legacy of one thousand dollars.

"Third. I give, bequeath, and devise to my said daughter, Ellen P. Noble, one third part of all of the rest and residue of my estate, real and personal, to hold to her for her sole and separate use, and free from the interference or control of her husband, her heirs and assigns forever.

"Fourth. I give, bequeath and devise to my beloved daughter, Elizabeth A. Greenleaf, the wife of Laban Greenleaf, one third part of all said rest and residue of my estate, real and personal, to hold to her for her sole and separate use, and free from the interference or control of her husband, her heirs and assigns forever; provided, however, that there shall be set apart from her share a legacy of five hundred dollars for each of her

children, Adelaide, Joseph Edward and Samuel C., the same to be kept at interest until the youngest child becomes twenty-one years of age, the interest meanwhile to be paid over to said legatees respectively.

"Fifth. I give, bequeath and devise to my beloved son, Calvin W. Bates, one third part of all said rest and residue of my estate, real and personal; provided, however, that from his share five hundred dollars shall be paid to my daughter Elizabeth, two thousand dollars shall be disposed of with the residue of my estate, and a legacy of five hundred dollars shall be set apart for each of his children, Joel Gibson and Arthur, said legacies to said children to be kept at interest until the youngest child becomes twenty-one years of age, the interest meanwhile to be paid over to said Joel Gibson and Arthur respectively."

On September 2, 1867, the testatrix made a codicil to her will, which was also admitted to probate, and contained the following provisions:

"I direct that there be paid out of the share of property which I have given to my daughter, Ellen P. Noble, a legacy of five hundred dollars to her son, Ivory B. Noble; and if she should have any other children living at my decease, I bequeath to each of them a like legacy, to be also taken from my said daughter's share, such legacies to be kept at interest until the youngest child becomes twenty-one years of age, the interest meanwhile to be paid to said legatees respectively.

"It is my will that the legacy of five hundred dollars, which I have by my will directed to be paid to my daughter Elizabeth from the share of my son Calvin, be paid from the residue of my estate, and not from said Calvin's share."

All the persons named in the will were living at the death of the testatrix. The defendant was duly appointed, on September 6, 1869, administrator *de bonis non* with the will annexed of Ruth Bates, and filed a bond, with sureties. The defendant also filed, on November 27, 1869, an inventory of the estate, by which it appeared that the personal property consisted of shares of bank stock appraised at \$292, and that the real estate was appraised at \$30,000, less \$2000 mortgage on the real estate.

The defendant filed no account of his administration until March 17, 1879, when he filed an account setting forth that no

property had been received other than that stated in the inventory, except the income hereinafter mentioned, and that no division of the estate had ever been made; but that since the death of the testatrix, Ellen P. Noble, Elizabeth A. Greenleaf and Calvin W. Bates had, with the consent and approval of the defendant, taken the income from the bank stock and the real estate in equal shares as heirs at law, and had paid the funeral expenses and the taxes and other expenses pertaining to the real estate, and that Calvin W. Bates had furnished the money to pay the interest due on said mortgage of \$2000, the principal of which appeared still to be unpaid.

None of the legacies named in said will have been paid or discharged, and no fund had been provided or set apart from other property belonging to the estate for the payment of said legacies.

The plaintiff was duly appointed administrator of the estate of Adelaide Frampton, formerly Adelaide Rodgers, who died on November 29, 1878, and the plaintiff's intestate was the person named in the will as "Adelaide," and she was the daughter of Elizabeth A. Greenleaf. Samuel C. Rodgers was the youngest child of Elizabeth, and was the person named in the will, and became twenty-one years of age on January 21, 1879; and thereafter, and previous to the beginning of this suit, a demand for the legacy with interest thereon was duly made by the plaintiff upon the defendant.

The Superior Court ordered judgment for the defendant; and the plaintiff appealed to this court.

F. D. Ely, for the plaintiff.

J. Willard, for the defendant.

MORTON, J. The first question which arises is whether the legacy of \$500 given to Adelaide by the fourth article of the will was a general legacy, to be paid by the executor, or a legacy charged upon the estate of Mrs. Greenleaf, to be paid by her.

The will contains similar provisions in favor of the other children of the testatrix, a son and daughter, and of their children respectively. No one can doubt the purpose of the testatrix that the legacy to each grandchild should be paid out of the third part of the residue set apart for its parent, and not out of the general residue of the estate before a division.

The plaintiff contends that the intention of the testatrix was, that, after the payment of the debts and the legacies to her two daughters, the residue of the estate should be divided into three parts, for the benefit of her three children respectively and their families; that, out of the part designed for each child, the executor should set apart and pay five hundred dollars to each of his or her children; and that the balance only of such third part was devised to such child.

On the other hand, the defendant contends that her intention was to devise the whole of each third part of the residue to her son or daughter, and to charge the estate devised and the devisee with the duty of setting apart and paying five hundred dollars to each of his or her children.

Looking at the whole of the will and codicil, the question is not entirely free from doubt, but we are of opinion that the latter is the more natural and reasonable construction.

The property of the testatrix consisted almost exclusively of real estate. She by direct and distinct language devises one third of the residue, after debts and legacies are paid, to each child, to be held in fee. So direct a devise ought not to be cut down, unless it is clear from the other parts of the will that it was her intention to give the devisee less than the residue devised. The language of the proviso, that "there shall be set apart from her share a legacy of five hundred dollars for each of her children," is appropriate to create a charge upon real estate to which the devisee is to take the title. The will makes no provision for the payment of these legacies by the executor, and the fact that they are given in a manner so different from the cash legacies to her daughters, Mrs. Noble and Mrs. Greenleaf, raises an implication that, according to her understanding, they were to be paid in a different manner. The fact also that there were no means by which the executor could pay these legacies, except by a sale of the real estate which she had in terms devised to her children, throws some light upon her probable intentions.

Upon a view of the whole will, we are of opinion that the intention of the testatrix was to devise the whole of the residue to her three children, in equal parts, and to charge each part devised and the devisee with the duty of paying the legacy to

each of his or her children, and not to create a liability on the part of the executors to pay such legacies. *Henry v. Barrett*, 6 Allen, 500. *Taft v. Morse*, 4 Met. 523. *Gardner v. Gardner*, 8 Mason, 178.

It follows that the plaintiff cannot maintain this action.

Judgment affirmed.

JULIUS STONE'S CASE.

Suffolk. March 23. — July 1, 1880. AMES & LORD, JJ., absent.

The provision of the Gen. Sts. c. 124, § 8, that "no arrest shall be made after sunset, unless specially authorized by the magistrate making the certificate," does not apply to an arrest upon an execution for costs only.

SOULE, J. The prisoner was arrested after sunset on February 7, 1880, on an execution issued against him for costs. He was taken before a magistrate authorized to administer the oath for the relief of poor debtors, and, being interrogated, declared that he did not wish to take any oath, nor to recognize, nor to give bail. He was thereupon committed to jail. On February 14, he recognized with surety to deliver himself up for examination before some magistrate authorized to act, within thirty days from the day of his arrest, and was thereupon discharged from custody. On March 2, he was surrendered by his surety, and kept in custody by the jailer. On the same day a writ of *habeas corpus* was issued in his behalf.

The prisoner contends that his imprisonment is unlawful, because his arrest after sunset was not specially authorized by a magistrate. His argument rests on an erroneous construction of the Gen. Sts. c. 124, § 8. The main purpose of that chapter of the statutes is to regulate arrests on mesne process, and on executions issued for debt or damages in civil actions. The first three sections prescribe the conditions on which defendants may be arrested on mesne process. Section 4 relieves officers from responsibility for not making arrests when not specially required to do so.

Section 5 provides that no arrest shall be made on an execution issued for debt or damages in a civil action, except in an action of tort, unless the creditor or some one in his behalf, after execution has issued amounting to twenty dollars exclusive of all costs which make part of the judgment, and while so much as that amount remains uncollected, makes affidavit to certain charges before a magistrate, which affidavit, with the certificate of the magistrate that he is satisfied that there is reasonable cause to believe that the charges, or some one of them, are true, must be annexed to the execution.

Section 6 provides that no affidavit shall be required to authorize arrest on an execution issued for costs only, but that the debtor arrested shall be committed, unless he requires the officer to take him before a magistrate authorized to administer the poor debtor's oath, and that all other proceedings in relation to the debtor shall be in conformity with the provisions of the chapter relative to arrests on other executions.

Section 7 provides that no woman shall be arrested on any civil process, except for tort.

Section 8 is in these words: "No arrest shall be made after sunset, unless specially authorized by the magistrate making the certificate, upon satisfactory cause shown."

The provisions of this chapter of the statutes are in restraint of the general power of arrest on mesne process and on execution, and the prisoner must show that his arrest was in violation of them, in order to be entitled to a discharge from imprisonment. *Hildreth v. Brigham*, 12 Allen, 71. In our opinion, the eighth section of the chapter has no application to arrests on executions issued for costs only. As applied to them, the clause of the section which creates an exception to the general rule that no arrest shall be made after sunset is insensible, because the affidavit required in other cases is not required in this, and no magistrate makes any certificate. The creditor on an execution for costs only cannot bring himself within the case which the statute requires in order to the making of the affidavit and certificate. There is never due on his execution the amount of twenty dollars exclusive of costs. Nor is there any force in the suggestion that because this is so, because the certificate cannot be had, no arrest after sunset can be made on the execution for

costs. The proper deduction is that the section does not apply. If it had been the intention of the Legislature to prohibit arrests on executions for costs after sunset, the prohibition would have been clearly expressed. No provision in the whole chapter, unless it be the one now under consideration, attempts to interfere with or limit the right to arrest on an execution for costs, while § 6 expressly says that this right is not to be subject to the conditions and limitations which are imposed in the case of executions for debt and damage, and merely provides for the proceedings to be had after the arrest is made. It is not to be supposed that the Legislature intended to cut off the creditor in an execution for costs from the right to arrest his debtor after sunset, under any circumstances, in the absence of a clear enactment to that effect, while it left that right to the creditor in an execution for debt or damages, under certain conditions, and subject to the discretion of certain magistrates.

The prisoner was lawfully arrested, and the proceedings since his arrest have not been such as to entitle him to a discharge. He must therefore be

Remanded.

H. L. Harding, for the petitioner.

C. Q. Tirrell, *contra*.



MARTIN P. STANDISH *vs.* OLD COLONY RAILROAD COMPANY.

Suffolk. June 22. — July 2, 1880. COLT, J., absent.

The memorandum of a judge of the Superior Court, stating the grounds of his overruling a motion to set aside an award, is no part of the record; and the remedy of the party aggrieved is by bill of exceptions, and not by appeal.

APPEAL from an order of the Superior Court for judgment on an award made and returned into that court in pursuance of a submission under the Gen. Sts. c. 147, §§ 1, 2.

The record showed that the appellant, on October 27, 1879, entered with the appellee into a submission, under the statute, of the appellant's claim for damages sustained by reason of personal injuries alleged to have been caused by the negligence of

the appellee on August 29, 1879, while the appellant was a passenger on the railroad of the appellee, to the determination of three arbitrators, the award of whom, or of the majority of whom, being made and reported to the Superior Court for the county of Suffolk, the judgment thereon was to be final; that, under date of November 3, 1879, the arbitrators reported to the court their award, which set forth that the arbitrators, in pursuance of the submission, had duly notified the parties, and, having heard and considered their several allegations, proofs and arguments, awarded and determined that the appellee should pay to the appellant the sum of \$1200, and should also pay certain bills.

The record further showed, that the appellant filed a motion to set aside and vacate the award, assigning certain reasons therefor which it is now unnecessary to state; that the appellee filed a motion, setting forth that the bills referred to in the award had been paid, and moving that judgment be entered on the award for \$1200 and interest from the date of the award; and that the court accepted the award, and ordered judgment accordingly.

The copies from the Superior Court included this memorandum, signed by *Pitman, J.*, following the appellant's motion to set aside and vacate the award: "Jan. 13, 1880. Motion overruled. I hold that the matters set forth in the within motion, if proved, are not sufficient in law to authorize setting aside the award."

A. R. Brown & E. A. Alger, for the appellant.

J. H. Benton, Jr., for the appellee.

BY THE COURT. The judge's memorandum of the ground of his ruling is no part of the record, and therefore the remedy of the party aggrieved is not by appeal, but by bill of exceptions. Gen. Sts. c. 114, § 10; c. 115, § 7. *Judgment affirmed.*

WILLIAM MINOT vs. HENRIETTA TAYLOR & others.

Suffolk. March 16. — July 8, 1880. AMES & LORI, JJ., absent.

A testator, by his will, gave an equitable life estate in one fourth part of the residue of his estate to each of his two surviving sons with a limitation over to his issue, a life estate in one fourth to the children of his deceased son H. with a like limitation over to their issue, and a life estate in the remaining fourth to his daughter S. with a limitation of a life estate to her children and a further limitation over to her grandchildren. He then provided as follows: "And if either of my said children shall die without children or grandchildren, I direct the share of income of such child or children to be paid to my surviving child or children and to the children of my son H. in the manner above provided during the natural life or lives of such surviving child or children and grandchildren. It is my intention that my grandchildren shall take by representation, and, on the failure of issue of either of my children, the share of such child shall vest in the issue of my surviving children and the issue of my son H., and be paid whenever the same is distributable agreeably to the provisions of this will." The testator's son W. died without issue. Before the death of W., the other son of the testator and his daughter S. had died, each leaving issue. *Held*, that the income of W.'s share should be divided equally among the issue of each of the testator's three children who left issue.

A testator devised property in trust to pay the income to A. for life, with remainder to his children for life, and, on their death, to pay the principal to A.'s grandchildren on their respectively coming of age. At the death of the testator A. had one child living, who was then unmarried. At the death of A., this child had children living. *Held*, that the trustee could not ask the instruction of the court on the question whether the devise to the grandchildren was void for remoteness, until the death of the child of A.

BILL IN EQUITY by the trustee under the will of William Taylor to obtain the instructions of the court. Hearing before *Endicott, J.*, who reported, for the consideration of the full court, the following case:

William Taylor died in February 1838, leaving, as his only heirs and next of kin, 1st, a son, John P., 2d, a son, William, 3d, a daughter, Sarah A. W. Kennedy, a widow, having a son then living, William T. Kennedy, and 4th, six children of his deceased son Henry.

The testator by his will, which was duly admitted to probate, after providing for the payment of certain legacies, devised the residue and remainder of his estate to trustees, and directed them to pay to each of his three children one quarter part of the net income half yearly, and the other quarter part of the net income to the children of his son Henry, during their lives. The will then proceeded as follows:

“And in case any of said Henry’s children decease without issue, the share of such deceased child to go to the survivors, and upon the decease of my said son Henry’s children I direct that one quarter part of the residue and remainder of my estate be distributed among his grandchildren, such grandchildren representing their parents and receiving their shares as they respectively attain the age of twenty-one years and in the mean time to receive the income of their respective shares.

“And in case my said son William shall decease without children, it is my will that his wife Elizabeth shall receive the same annuity as is hereinbefore given to him during her natural life.

“And on the decease of my said sons severally and of said Elizabeth Taylor (if my said son William decease before her without issue) I direct my said trustees to pay to the children of each of my said sons one fourth part of the residue and remainder of my estate, such payments to be made to my said grandchildren as soon after the decease of their fathers as said grandchildren shall attain the age of twenty-one years.

“And as to the other fourth part of the residue and remainder of my estate I direct my said trustees to hold the same (after my said daughter Sarah’s decease) during the lives of her children, and to pay the net interest and income thereof to her children half-yearly or oftener if convenient to said trustees, and at the decease of said Sarah’s children the said fourth part of the capital of said residue and remainder of my estate shall be paid to her grandchildren as they respectively attain the age of twenty-one years, such grandchildren taking by right of representation and while said grandchildren are minors, after the decease of their parents they shall respectively receive the net income of the capital to which they will severally be entitled at their majority.

“And if either of my said children shall die without children or grandchildren, I direct the share of income of such child or children so dying without children or grandchildren to be paid to my surviving child or children and to the children of my said son Henry (excepting however the provision hereinbefore made for the wife of my son William) in the manner above provided during the natural life or lives of such surviving child or children

and grandchildren. It is my intention that my grandchildren shall take by representation, and on the failure of issue of either of my children the share of such child dying without issue shall vest in the issue of my surviving children and the issue of my said son Henry, and be paid whenever the same is distributable agreeably to the provisions of this will. But I direct whatever may fall to the children of my daughter Sarah in virtue of the foregoing provisions, in addition to one quarter part of the residue and remainder of my estate hereinbefore bequeathed in trust for the benefit of said children after the decease of their mother, shall be held on the like trusts as are declared in relation to that quarter part."

John P. Taylor died on December 16, 1873, leaving issue. Mrs. Kennedy died in 1876, leaving, as her only child, her son William T. Kennedy, who now has two children living, who were born during the lifetime of their grandmother, and are still minors. The testator's son William died without issue on February 10, 1878. His wife died before him.

The trustee asked the instructions of the court on the question to whom the property devised for the benefit of William was to be distributed, and on the question whether the devise for the benefit of the testator's daughter Sarah and for her children and grandchildren created a perpetuity, and whether William T. Kennedy was entitled to the income of his mother's share during his life.

C. A. Welch, for William T. Kennedy and his children.

D. S. Richardson, for the children of John P. Taylor.

G. H. Ball, for the children of Henry Taylor.

MORTON, J. The will of William Taylor is somewhat confused in expression, but the general purpose and scheme of the testator is clearly apparent. He intended to divide the residue of his estate, after paying certain legacies, into four equal parts, one fourth part to go to the benefit of each of his three children who survived him and their issue respectively, and one fourth part to the children of his deceased son Henry and their issue. He gives an equitable life estate in one fourth part to each of his surviving sons with a limitation over to his issue, a life estate to the children of his deceased son Henry with a like limitation over to their issue, and a life estate to his daughter Sarah with

a limitation of a life estate to her children and a further limitation over to her grandchildren. He then proceeds to make provision for the case of either of his surviving children dying without issue, in the following words: "And if either of my said children shall die without children or grandchildren, I direct the share of income of such child or children so dying without children or grandchildren to be paid to my surviving child or children and to the children of my said son Henry (excepting however the provision hereinbefore made for the wife of my son William) in the manner above provided during the natural life or lives of such surviving child or children and grandchildren. It is my intention that my grandchildren shall take by representation, and on the failure of issue of either of my children the share of such child dying without issue shall vest in the issue of my surviving children and the issue of my said son Henry, and be paid whenever the same is distributable agreeably to the provisions of this will."

The first question in the case is as to the construction of this clause. The testator's son William and his wife have died without issue. Before the death of William, the testator's son John and his daughter Sarah had died each leaving issue; and the children of Henry contend that they are entitled to the whole of the income of the share of William, to the exclusion of the issue of John and Sarah. We are not able to adopt this construction. The phraseology is confused and obscure, but it seems to us that, upon reading the whole will, the intention appears that, in the contingency which has happened, the income of William's portion should be divided into three parts, one part of which is payable to the issue of each of the testator's three children who left issue. This construction alone is consistent with the main purpose of the testator, an equality of division between the different branches of his family. We think that the testator intended to use the words "surviving child or children" to designate children surviving at his death, and that the declaration of his intention that grandchildren should take by representation, and that the share of a child dying without issue should vest in the issue of surviving children and the issue of his son Henry, was intended to qualify and explain the previous provision, that the share of income of a child dying without issue

should be paid "to my surviving child or children and to the children of my son Henry." The words "it is my intention that my grandchildren shall take by representation" seem to refer to all his grandchildren, and unless they qualify the previous provision they are useless and without force.

We are of opinion that the clause in question gives to the children of each of the testator's deceased children a share of the income of the portion held for William, to be paid to them until the principal is distributable according to the provisions of the will.

The other question raised by the report, whether the limitation over to the grandchildren of Sarah as they attain the age of twenty-one years is void for remoteness, is premature, and cannot properly be considered in this suit. It may involve the rights of persons not now in being, and does not affect the present duty of the trustees. The limitation of a life estate to the children of Sarah is a valid limitation, as it vested in her child William T. Kennedy at the death of Sarah, and it is the duty of the trustee to pay the income of her share to him during his life. The trustee has the right to ask the instruction of the court as to his present duties, but not as to what may be his duty in future uncertain contingencies.

Decree accordingly.

JOHN O. TEELE *vs.* ASA S. HATHAWAY & others.

Suffolk. March 16. — July 3, 1880. AMES & LORD, JJ., absent.

A testator devised the residue of his estate to a trustee upon the following trusts:

"In case my daughter shall be left a widow, to pay over to her, during her widowhood, all the interest on such sums as may be in his hands at the time she shall become a widow; and in case my said daughter shall leave any child or children, the amount in said trustee's hands shall be paid over to such child or children at their maturity, or when of full age of twenty-one years;" in case she should leave no child or children, the trustee was to pay over the amount in his hands to the testator's brother. The daughter survived the testator, and died leaving a husband and two children, one of whom subsequently died unmarried before either child came of age. *Held*, that the grandchildren took interests in the nature of remainders, which vested in them at least upon the death of their mother; and that the interest of the child who died passed upon his death to his father as his heir

BILL IN EQUITY, by the trustee under the will of Mary S. Barbour, to obtain the instructions of the court. Hearing before Ames, J. who reserved the case for the consideration of the full court. The facts appear in the opinion.

J. F. Brown, for Asa S. Hathaway.

C. R. Train, for Carl Hathaway.

MORTON, J. In the will which we are called upon to construe, the testatrix gives the residue of her estate to a trustee to hold in trust "for the following objects, to wit: In case my daughter shall be left a widow, to pay over to her during her widowhood all the interest on such sums as may be in his hands at the time she shall become a widow. And in case my said daughter Mary L. Hathaway shall leave any child or children, the amount in said trustee's hands shall be paid over to such child or children at their maturity or when of full age of twenty-one years. And in case said Mary L. shall leave no child or children, then the amount in my trustee's hands shall be paid over to my brothers Joel and Benjamin or their several legal representatives, in equal proportions to said Joel and Benjamin or their several representatives, meaning their children."

The testatrix died in February 1875, leaving a daughter Mary L. Hathaway, who died in July 1875, leaving a husband and two children, Carl, who was born on February 25, 1872, and Simon, who was born on April 6, 1875, and who died on August 6, 1875.

Under these circumstances, we have no doubt that the brothers of the testatrix, Joel and Benjamin, take nothing under the will, the limitation over to them being intended to take effect in case the said Mary L. shall leave no child or children at her death, that is, upon a definite failure of issue.

The principal question in the case is, whether, under the eighth article, the equitable interests of the children of Mary vested either at the death of the testatrix or of Mary, or whether the vesting is postponed until the children respectively become of age.

The will is inartificially drawn, and we do not attach any importance to the fact that it is not in the form of a direct gift or bequest to the children, but of a direction to the trustees to

pay over to them at their maturity. The substantial purpose of the testatrix was to give the property to her grandchildren, to be enjoyed by them at their maturity. As a general rule, the law favors the vesting of gifts rather than the postponement, unless the latter is clearly shown to be the intention of the testator. In this will, we are not able to find any decisive indications of an intention that the gifts should not vest in right until the majority of the grandchildren. It seems clearly to have been the intention of the testatrix to dispose of all her estate, and not to leave any part of it as intestate property. There is a limitation over to her brothers in case Mary L. shall leave no children, but there is no limitation over in case she shall leave children at her death, which indicates an understanding on the part of the testatrix that in the latter case the property was fully disposed of by the will. But if the estate does not vest in the grandchildren until their maturity, then in case Mary L. should leave children and such children should die before maturity, the property would be undisposed of. In this important respect, as well as in other respects, this case differs from *Hall v. Hall*, 123 Mass. 120, relied upon by the counsel for the surviving grandchild.

Again, in construing the will, we must take our stand at the death of the testatrix and look at all possible contingencies. If the equitable estates of the grandchildren do not vest until their maturity, then in case one of the grandchildren should die before maturity leaving issue, such issue would take nothing, a result which would not be presumed to be intended by the testatrix unless such intention is clearly manifested.

Upon the whole, we are of opinion that, under this will, the grandchildren took interests in the nature of remainders, which vested in them at least upon the death of their mother. It is not necessary to inquire whether they vested at an earlier period. It follows that, upon the death of Simon Hathaway, his interest in the trust fund passed to his father under our statutes of distribution, and the trustee holds the fund one half for the benefit of Cari, and one half for the benefit of the father, Asa S. Hathaway. As to this last-named half, the trustee holds it upon a mere dry trust. As to it, the scheme of the testatrix has been defeated by the events which have happened, and the *cestui que trust* is *sui juris* and capable of managing his property. It is

not for the interest of any one that the trust should be continued; and we are therefore of opinion, that, as to this part of the fund, the trust should be terminated, and the amount paid over to Asa S. Hathaway. *Decree accordingly.*

THOMAS J. COOLIDGE vs. WILLIAM S. DEXTER.

Suffolk. March 24. — July 3, 1880. AMES & LORD, JJ., absent.

A mere reference to a plan, in the descriptive part of a deed of a lot of land, does not import a stipulation by the grantor that the plan shall not, in any respect, be subsequently changed in parts not adjacent to the land sold.

MORTON, J. This is an action of contract upon a written agreement, by which the plaintiff agreed to sell and the defendant agreed to buy a lot of land on Marlborough Street in Boston, the plaintiff stipulating that he would convey a good title, free from incumbrances. The defendant refuses to perform the agreement, upon the ground that the plaintiff is not able to give a good title.

The plaintiff's title is derived from the Commonwealth of Massachusetts, under a deed dated May 31, 1872. It is admitted that the Commonwealth, in and prior to the year 1857, was seised in fee of a large tract of land known as the Back Bay lands, of which the premises in question are a part, and that the title of the Commonwealth continued until the sale to the plaintiff; but the defendant contends that, by the acts of the Commonwealth between these two dates, the premises became subject to certain easements, so that the deed to the plaintiff did not convey a title free from incumbrances. The facts bearing upon this question are in substance as follows:

In 1857, the Back Bay commissioners prepared a plan for the laying out and improvement of the Back Bay lands, which was made a part of their fifth annual report to the Legislature. On this plan is represented a rectangular piece of land bounding on Beacon Street, Exeter Street and Marlborough Street, which, though not so designated, appears to be intended for a public

square, and on the east of this square is a passageway forty feet wide. After the adoption of this plan, the commissioners, under the authority of the Legislature, sold to various individuals lots of land lying east of Dartmouth Street, and in the several deeds reference was made to this plan.

Afterwards, and before the sale to the plaintiff, the Commonwealth made changes in this plan, by which the said square and forty-foot passageway were discontinued, and the land covered by them appropriated to building purposes.

The plaintiff's lot is situated partly on the square and partly on the passageway; and the ground taken by the defendant is, that the deeds of the lots east of Dartmouth Street gave to the grantees an interest in the nature of an easement in the square and passageway, and estopped the Commonwealth from ever afterwards appropriating the land covered by them on the plan to any other purposes. The deeds of the lots east of Dartmouth Street are substantially alike in form. Each deed conveys to the grantee "a certain parcel of land or flats in the Back Bay so called, bounded and described as follows, . . . reference being had to the plan accompanying the fifth annual report of the commissioners on the Back Bay, dated January 21, 1857."

The question is whether this general reference to the plan imports a stipulation by the grantor that the plan shall not be in any respect changed in parts remote from and not immediately connected with the lot sold to the grantee.

It is a question of the intent of the parties. At the time this form of deed was adopted, the whole of the land was covered by water, and it was very inconvenient, if not impracticable, to establish physical monuments to mark the boundaries of the lots sold. A reference to the plan was necessary in order to designate with accuracy the lots intended to be conveyed. As was stated by Chief Justice Bigelow, "we do not think that a mere reference to a plan in the descriptive part of a deed carries with it by necessary implication an agreement or stipulation that the condition of land, not adjacent to, but lying in the vicinity of, that granted, as shown on the plan, or the use to which it is represented on the plan to be appropriated, shall forever continue the same so far as it may be indirectly beneficial to the land included in the deed, and was within the power

or control of the grantor at the time of the grant." *Light v. Goddard*, 11 Allen, 5, 8. The deeds from the Commonwealth contain no stipulations that the plan shall not be changed in other localities. They do contain express stipulations that "the streets in said Back Bay, on which said premises bound," "shall be forever kept open to be used for all the purposes for which public highways may be lawfully used;" and that the passageway which forms the rear boundary of the lots sold shall "be kept open and maintained by the abutters in common." It is to be presumed that, if the parties understood that the Commonwealth bound itself to make no changes in the plan of this extensive territory, in deeds so carefully drawn it would have been so expressed. The square and passageway which the Commonwealth by its change of plan discontinued are remote from the lots east of Dartmouth Street;* they are not connected with those lots, nor necessary for their enjoyment, nor needed to furnish access to them. We are of opinion that the deeds of those lots did not give the grantees any easement or other interest in the square and passageway, and did not operate to estop the Commonwealth from discontinuing them and appropriating the land to other uses.

We have considered this case as if the Commonwealth were merely the private owner of the Back Bay territory. As in this view, which is most favorable to the defendant, he fails to maintain his defence, it is not necessary to inquire whether in its dealings with this territory the Commonwealth acted solely as a private owner, or in regard to the streets and squares in its sovereign capacity, in which case different rules would govern. See *Attorney General v. Gardiner*, 117 Mass. 492. The result is, that the plaintiff is entitled to maintain his action.

Judgment for the plaintiff.

L. S. Dabney, for the plaintiff.

F. V. Balch, for the defendant.

G. Marston, Attorney General, in behalf of the Commonwealth, was permitted to file a brief.

* By a plan used at the argument, the easterly boundary of the land in question appeared to be about four hundred and thirty feet westerly of Dartmouth Street.

JOHN CHILD & another vs. NEW YORK AND NEW ENGLAND
RAILROAD COMPANY & another.

Suffolk. March 19. — July 5, 1880. AMES & LORD, JJ., absent.

By the terms of a mortgage made by a railroad corporation to trustees, to secure the payment of certain bonds with interest coupons attached, in case of default in payment of principal or interest, the trustees were to take possession of the property mortgaged for the purposes of foreclosure, and on the foreclosure becoming absolute, by such possession continuing a certain time, the bondholders might form themselves into a new corporation, with a capital stock equal to the outstanding mortgage debt, at a meeting at which each bondholder was entitled to cast one vote for "every one thousand dollars principal sum of such bonded debt held by him." It was further provided that the new corporation should consist of the holders of the mortgage bonds, "at the rate of ten shares for every bond of one thousand dollars, as said bonds shall be surrendered to said new corporation to be exchanged for certificates of stock at the rate aforesaid." While this mortgage was in force, the railroad corporation made a contract with A., by which the latter agreed that the interest maturing on a portion of the mortgage bonds should be paid at maturity; that an agreement to that effect should be indorsed on these bonds; and that any interest which A. should be obliged to pay should be and remain a valid lien on all the property secured by the mortgage. *Held*, that, upon foreclosure of the mortgage, the capital stock of the new corporation was to be determined by the principal sum of the mortgage debt, without regard to the unpaid interest; and that a holder of bonds, issued under the contract between the corporation and A., and who had received payment of interest from A., was entitled to ten shares of stock for each bond, without redeeming the coupons paid; that A. was not entitled to any stock; and that a person to whom A. had sold interest coupons when overdue had no greater rights than A.

BILL IN EQUITY, originally brought by John Child, the holder of certain mortgage bonds, issued by the Boston, Hartford and Erie Railroad Company, to compel the first-named defendant to issue to him, upon the surrender of the bonds, shares of stock in the defendant corporation. John Foster, the holder of similar bonds, was, after the filing of the bill, allowed to join as a party plaintiff; and the New York, Lake Erie and Western Railroad Company, the holder of certain interest warrants or coupons, once attached to the bonds held by the plaintiffs, was permitted to become a party defendant. The case was heard by *Morton, J.*, on the bill and answers, and reserved for the determination of the full court. The facts appear in the opinion.

F. W. Hurd, for John Child.

D. Foster, for John Foster.

T. K. Lothrop, for the New York & New England Railroad Company.

W. D. Shipman (of New York), for the New York, Lake Erie & Western Railroad Company.

MORTON, J. The rights of the parties in this case depend upon the true construction of the mortgage executed on March 19, 1866, by the Boston, Hartford and Erie Railroad Company, and known as the Berdell mortgage. This mortgage was given to trustees to secure bonds, each in the sum of one thousand dollars, issued by the company to the amount of twenty millions of dollars, payable on the first day of January 1890, with interest at the rate of seven per cent per annum, payable semiannually on the first days of January and July in each year, upon the presentation and delivery of the proper interest warrants annexed to the several bonds.

By the provisions of the mortgage, in case of any default, in the payment of principal or interest, continuing for six months, the trustees are authorized to take possession of the road and other property mortgaged, for the purposes of foreclosure, and, if such default continue for eighteen months after notice of the entry to foreclose is given to the mortgagor, the foreclosure shall be absolute, and the whole of the property shall vest absolutely and in fee in the trustees.

The tenth article is as follows: "In case of an absolute foreclosure under the provisions of this instrument, it shall be the duty of the trustees to call a meeting of the holders of the mortgage bonds secured by this instrument, by an advertisement of the time and place and object thereof, at least three times a week, for three successive weeks, in newspapers published, one in the city of Boston, one in the city of Providence, one in the city of Hartford, one in the city of New York, and one in London, in England; and the bondholders at such meeting may, at an election to be presided over by such of the parties of the second part or their successors as shall be present, and in which each bondholder may cast one vote for every one thousand dollars principal sum of such bonded debt held by him, choose from their number a board of directors of like

number with the then board, and may organize themselves into a corporation, with a corporate name to be selected by them, and a capital stock equal to such outstanding mortgage debt, divided into shares of one hundred dollars each, which said corporation shall be invested with all the powers, privileges and franchises, and shall be subject to all the duties, liabilities and restrictions of the Boston, Hartford and Erie Railroad Company, and shall consist of the holders of the mortgage bonds secured hereby, at the rate of ten shares for every bond of one thousand dollars or of two hundred pounds sterling, as said bonds shall be surrendered to said new corporation to be exchanged for certificates of stock at the rate aforesaid. And the said parties of the second part shall by deed convey unto the said new corporation all the said mortgaged property, premises, estate and franchises, and all additions thereto, and all moneys remaining in their hands when they shall be fully paid and indemnified for their services and liabilities as hereinbefore provided; copies of which said deed shall be recorded or lodged wherever this instrument is required by law to be recorded or lodged; and upon the organization of the bondholders into a corporation, they shall file, in the offices of the several secretaries of state above named, copies of their proceedings in the organization, under their corporate seals, attested by their president and secretary, which shall be *prima facie* evidence in all suits for or against them that they are a corporation; and after that time no bondholder shall participate in the earnings of the mortgaged property until he surrenders his bonds to the new corporation, as herein provided."

The mortgagor failed to pay the interest warrants annexed to the bonds, and after the default had continued more than six months the trustees took possession of the mortgaged premises, in September 1871; and, after the lapse of eighteen months, the default still continuing, they called a meeting of the bondholders, at which meeting, viz. in April 1873, the New York and New England Railroad Company was duly organized as a corporation. In May 1873, the States of Massachusetts, Rhode Island and Connecticut, through which the road runs, severally passed statutes ratifying and confirming the proceedings of the bondholders by which the corporation was formed. In each of these statutes, the second section provides that "the capital

stock of said company shall not exceed two hundred thousand shares of one hundred dollars each; and the same may be issued to the holders of said bonds upon the surrender thereof to said corporation, as provided in said mortgage, at the rate of ten shares for every bond of one thousand dollars so surrendered."

It appears that, before the trustees had taken possession for the purpose of foreclosure, the Erie Railway Company, under a contract with the Boston, Hartford and Erie Railroad Company, to which we shall hereafter refer, had paid to certain holders of bonds secured by the mortgage a large number of the interest warrants, which upon such payment were detached from the bonds and delivered to said Erie Railway Company, and which it has since transferred to the New York, Lake Erie and Western Railroad Company, one of the parties to this suit.

The first question is whether the New York and New England Railroad Company is required to issue certificates of stock to the holders of the bonds at the rate of ten shares for every bond of one thousand dollars, and also to issue certificates of stock at the same rate to the holders of interest warrants which were due and unpaid at the time of the organization of the corporation. It seems to us clear that the purpose and understanding of the parties to the mortgage was that, if the trustees were obliged to foreclose, the holders of the bonds should form a corporation with a capital stock of twenty million dollars, and that certificates of the stock should be exchanged for the bonds to the same amount, at the rate of ten shares for each bond of one thousand dollars with all the unpaid interest warrants attached. The tenth article provides that the holders of the mortgage bonds may hold a meeting, at which each bondholder may cast one vote for every one thousand dollars principal sum of such bonded debt held by him, and may organize themselves into a corporation with "a capital stock equal to such outstanding mortgage debt," and that certificates of the stock shall be issued in exchange for the bonds, at the rate of ten shares for every bond of one thousand dollars. The article does not contemplate or provide for the case of interest warrants detached from the bonds, but treats the unpaid interest as an incident

of the principal debt. The expression "such outstanding mortgage debt," by which the limit of the capital is fixed, by natural construction refers to the principal sum of the bonded debt, which alone has been previously mentioned. This was the construction of the article adopted by the parties to the mortgage when they organized the new corporation, and by the Legislatures of the several States in the ratifying statutes, and is, we think, the true construction.

It follows that the New York and New England Railroad Company cannot issue certificates to the holders of the bonds to the amount of their face, and also to the holders of the detached interest warrants. It is required only to issue certificates to the amount of the principal sum of the bonds, whether the interest warrants have been detached or not.

But a more difficult question is whether, in cases where the interest warrants have been detached, the corporation should issue the certificates solely to the holders of the bonds, or in part to them and in part to the holders of the detached interest warrants, in proportion to their interests in the whole mortgage debt, principal and interest.

In an ordinary case of a bond with interest warrants attached secured by a mortgage, if the holder of the bond should sell the interest warrants, it may be that, when such holder realized the proceeds of the mortgage by a foreclosure or otherwise, he would hold them for the joint benefit of himself and the owner of the interest warrants, upon the ground that the mortgage is security for the whole debt, interest as well as principal; and it may be that, if, upon foreclosure, the proceeds are not sufficient to pay both, it would be equitable that they should be divided *pro rata* between all who are secured by the mortgage. Whether, under the peculiar terms of the Berdell mortgage, this result would follow, in case any of the bondholders had before the foreclosure sold their interest warrants by an ordinary contract of sale containing no special terms affecting the rights of the parties to it, we do not feel called upon to discuss. No party is represented in this case who holds interest warrants thus acquired. The only party to the case who holds detached interest warrants is the New York, Lake Erie and Western Railroad Company. It acquired the interest warrants from the Erie Railway Company

after they were overdue, and took only the rights of that company. The question therefore is whether the Erie Railway Company would be entitled, as the holder of detached interest warrants, to receive a portion of the stock which under the Berdell mortgage is to be issued in exchange for the bonds to which such warrants had been attached. If we assume that an ordinary purchaser of interest warrants would, under this mortgage, be entitled to share *pro rata* with the holder of the bond in the stock to be issued in exchange for the bond, yet we are of opinion that the Erie Railway Company, by its acts and contracts, is estopped from asserting this right against the plaintiffs.

The Erie Railway Company did not acquire these warrants by an ordinary purchase in the market. On October 8, 1867, it entered into an agreement with the Boston, Hartford and Erie Railroad Company, to which the trustees under the Berdell mortgage were a party, having for its main purpose the regulation of the joint business of the two connecting railroads.

By the ninth article of this contract it is provided that the Erie Railway Company, "on the terms and conditions expressed herein, and to promote the prompt development of the business aforesaid, is to agree with the several holders of bonds to the amount of four millions of dollars, secured by a mortgage to the party of the third part, that the interest maturing on their respective bonds shall be paid according to the tenor of such coupons, which said agreement is to be written or printed on said bonds in the words and figures following, to wit: 'In consideration of the provisions of a contract of even date for the use of the Boston, Hartford and Erie Railroad, by the Erie Railway Company, the Erie Railway Company hereby agrees with the holder of this bond that the several interest warrants hereto attached shall be paid as they respectively mature. Witness the seal of the Erie Railway Company and the signature of its secretary at the city of New York, the eighth day of October A. D. 1867.'" "And it is further agreed that any interest warrants which the said party of the second part shall be obliged to take up under the provisions of this contract or the indorsement which may be put on any of said bonds, shall be and remain a valid lien on all the franchises and property named in or secured by said

mortgage." By a subsequent agreement, dated July 9, 1868, the amount of the bonds of which the Erie Railway Company was to guarantee the payment of the interest warrants was raised to five millions of dollars, and the company agreed to purchase bonds to the amount of five millions of dollars, at the rate of eight hundred dollars for each bond of one thousand dollars. Under these agreements, the Boston, Hartford and Erie Railroad Company issued to the Erie Railway Company bonds to the amount of four million dollars or more, and the Erie Railway Company afterwards sold portions of these bonds after indorsing upon them the guaranty in the words provided in said ninth article. The bonds held by the plaintiffs in this suit are a part of the bonds thus sold and guaranteed. The Erie Railway Company under its said guaranty afterwards paid several of the interest warrants as they matured, which were detached from the bonds and delivered to the company.

Upon this state of facts we are of opinion that the Erie Railway Company could not in competition with the plaintiffs claim any right to the stock which under the mortgage is to be issued in exchange for their bonds. The plaintiffs bought their bonds with the agreement of the Erie Railway Company indorsed upon it, and upon the faith of the agreement. This agreement is essentially a guaranty. The company agrees that the several interest warrants shall be paid as they mature. If the maker of the bonds did not pay the interest, it was the duty of the guarantor to pay it. When the plaintiffs received the amounts of the interest warrants they had the right to regard it as payment and extinguishment of the interest, which diminished the amount of their debt and strengthened their security. To allow the company to treat the transactions as purchases of the interest warrants would make its guaranty of little or no value, and defeat the spirit of its agreement.

The stipulation in the contract of October 8, 1867, that the interest which the Erie Railway Company might be obliged to pay under its guaranty should remain and be a valid lien on the franchises and property secured by the mortgage, cannot affect the rights of the plaintiffs. It is not contained in the contract of the Erie Railway Company with the plaintiffs. The mere reference to that contract as the consideration of the guaranty

cannot fairly have the effect of incorporating into the guaranty its provisions and stipulations. This agreement might be of value to the Erie Railway Company in case the mortgaged property should be sufficient to pay the whole debt, both principal and interest, but it cannot defeat the rights of the plaintiffs under the guaranty which they held, nor alter the mode of foreclosure provided in the Berdell mortgage. *Haven v. Grand Junction Railroad*, 109 Mass. 88.

The Erie Railway Company stood as to the plaintiffs in the relation of a guarantor of the payment of the interest warrants; it was under a direct obligation to pay them in case of default of the principal debtor. Having made the payments in pursuance of this obligation, it is not entitled to be substituted to the rights of the plaintiffs in regard to those warrants, because such subrogation would defeat or impair the security of the plaintiffs for their debt, would violate the spirit of the contract of guaranty, and would be inequitable and unjust. *Wilcox v. Fairhaven Bank*, 7 Allen, 270. *Virginia v. Chesapeake & Ohio Canal*, 32 Md. 501, 539. *Ketchum v. Duncan*, 96 U. S. 659, 662. *Union Trust Co. v. Monticello & Port Jervis Railroad*, 63 N. Y. 311.

We are therefore of opinion that, upon all the facts of this case, the New York, Lake Erie and Western Railroad Company is not entitled as against the plaintiffs to any portion of the stock which is to be issued in exchange for the bonds held by the plaintiffs, and that the New York and New England Railroad Company should issue to the plaintiffs certificates of stock to the value of their bonds, at the rate of ten shares for every bond of one thousand dollars.

Decree accordingly.

**BOSTON SOCIETY OF REDEMPTORIST FATHERS vs. CITY OF
BOSTON.**

Suffolk. March 8. — July 8, 1880.

Land owned by a religious corporation, upon which no church edifice has been or is intended to be erected, and which is separated by a passageway from the portion of the estate on which the church of the corporation stands, and which is not necessary or incidental to the use of the church as a house of public worship, is not exempt from taxation, under the Gen. Sts. c. 11, § 5, *cl. 7.*

The fact that a benevolent or charitable corporation intends at some indefinite future time to occupy land owned by it for the purposes for which it was incorporated, does not exempt the land from taxation, under the Gen. Sts. c. 11, § 5, *cl. 3.*

CONTRACT to recover the amount of a tax assessed on May 1, 1876, by the defendant city, upon a lot of land owned by the plaintiff corporation on the west side of Bumstead Lane in Boston, and paid by the plaintiff under protest. The case was submitted to the Superior Court, and, after judgment for the plaintiff, to this court on appeal, upon the following agreed facts :

The plaintiff was organized in 1871, under the Gen. Sts. c. 32, and was authorized by the St. of 1875, c. 92, to hold real and personal estate, for the purpose of its organization, to the amount of \$100,000, in addition to the amount allowed by the General Statutes. The articles of association stated the purpose of the corporation to be "to promote Christian principles, and to reclaim the destitute, ignorant and vicious classes of the community from the evils under which they labor;" and provided that "no person shall be eligible to be elected a member of said corporation, unless he be a member of the congregation of the Most Holy Redeemer."

In April 1871, after its articles of association were recorded, the plaintiff purchased, for the purposes for which it was organized, a large parcel of land on Tremont Street in Boston, which was divided into two lots of unequal size by a private way called Bumstead Lane, the fee in the soil of which way was owned by the plaintiff, and over which the owners of certain other estates had a right of passage.

At the time of the conveyance there was a house on the lot east of Bumstead Lane, which house was at once occupied by the plaintiff for the purposes set forth in its articles of association. This house was afterwards enlarged, and new buildings, consisting of a clergy-house, school and church, were erected. No tax has been assessed on this lot, it being conceded that it was exempt from taxation under the General Statutes.

The lot on the west side of Bumstead Lane was not, at the time of the purchase, occupied by any building, and has remained vacant to the present time. The plaintiff intended to place one of its new structures on this lot, and surveys and plans were made, but it was discovered that the cost of obtaining a secure foundation for a large building would be much greater upon this lot than on the easterly lot, and the location of the buildings was accordingly changed. The plaintiff intends to construct one or more light buildings of wood on the westerly lot for school purposes. The land of this lot is loamy, and suited to cultivation, while that of the easterly lot is chiefly a solid ledge of rock; but such parts of each as are suited for cultivation are cultivated, and are and have been occupied by grass, vegetables and fruit-trees. The vegetable products are small, and are consumed by the officers and servants of the plaintiff, or given away in charity.

The plaintiff has leased no part of the premises, and has derived no profit from them; and no part of the premises has been occupied by other than the plaintiff's officers and servants. The entire parcel of real estate on the east and west sides adjoins lands with numerous buildings thereon, some of them tenement houses, densely populated, and the plaintiff contends that the lands are of value to the plaintiff for light and air, and to prevent the too near proximity of causes of sickness.

The chief business of the members of the congregation of the Most Holy Redeemer is preaching and religious exhortation and teaching. The entire front of the east parcel on Tremont Street is occupied by the buildings of the corporation, whose officers contend that both the east and west parcels are necessary to the purposes set forth in their articles of association, which claim the defendant denies.

If the court should find for the plaintiff, judgment was to be entered for \$355.60, with interest from December 21, 1876; otherwise, for the defendant.

J. A. Maxwell, for the plaintiff.

T. M. Babson, for the defendant.

AMES, J. It is according to the policy of our law that all the property of the inhabitants of the Commonwealth should contribute in fair and just proportion to the public burdens. The government assumes the protection of all property within its limits, whether owned by natural persons or corporate bodies, and it has a right to claim that such property is held subject to the reciprocal obligation of meeting, in its due proportion, the expenses incident to such protection. To this general rule there are exceptions, clearly and carefully defined in the Gen. Sts. c. 11, § 5; but the burden of proof is upon every party who claims exemption from taxation to show that his case comes clearly within some one of these exceptions. It is in no case to be assumed that the law intends to release any particular property from this obligation; and no such exemption can be allowed, except upon clear and unequivocal proof that such release is required by the terms of the statute. If any doubt arises as to the exemption claimed, it must operate most strongly against the party claiming the exemption. *Providence Bank v. Billings*, 4 Pet. 514. *Charles River Bridge v. Warren Bridge*, 11 Pet. 420. *Philadelphia & Wilmington Railroad v. Maryland*, 10 How. 376. *Jefferson Branch Bank v. Skelly*, 1 Black, 436.

We think it extremely clear that the plaintiff cannot contend that there is anything in the Gen. Sts. c. 11, § 5, *cl.* 7, upon which it can maintain this action. Under that clause, houses of religious worship are exempt from taxation; and it has been decided that the land on which such houses stand is included in the exemption. *Trinity Church v. Boston*, 118 Mass. 164. Real estate held by a religious society, not more than sufficient in extent to meet its reasonable requirements in this respect, and devoted by such society in good faith to the erection of a church edifice, is entitled to the exemption given by the statute. But it is the appropriation of the property to the sacred uses contemplated which secures this privilege. The lot of land which, as the plaintiff contends, was wrongfully taxed in this case, has

not been so appropriated. No church edifice has been erected upon it, and we do not find upon the facts agreed that any such edifice is intended to be erected upon it. On the contrary, it was found to be an unsuitable place for the church, and it is the plaintiff's intention to occupy it with one or more light buildings of wood for school purposes. It is separated by a clearly defined lane or passageway from the portion upon which the church stands; it is not necessary or incidental to the use of the church as a house of public worship, and the avowed intention of the plaintiff is to appropriate it to a purpose, which, however useful and praiseworthy in itself, is not public worship, and therefore not entitled to the exemption from taxation provided for in the seventh clause.

The plaintiff contends also that its case comes within the third clause of the section already referred to. That clause exempts from taxation "the personal property of literary, benevolent, charitable and scientific institutions incorporated within this Commonwealth, and the real estate belonging to such institutions, occupied by them or their officers for the purposes for which they were incorporated;" and it is insisted that the plaintiff is one of the institutions described in that clause, by virtue of its corporate organization under the Gen. Sts. *c.* 82. According to the terms of that chapter, as modified by the St. of 1869, *c.* 276, § 1, "Seven or more persons within this state, having associated themselves by agreement in writing for educational, literary, benevolent, scientific, charitable or religious purposes, under any name by them assumed, and complying with the provisions of this chapter, shall with their successors be and remain a body politic and corporate." It is contended, on the part of the plaintiff, that there has been a full compliance with the terms of that chapter. Supposing the fact to be so, however, we do not find that the plaintiff has fulfilled all the conditions upon which the exemption from taxation depends. We do not find, among the agreed facts, that the lot of land in question is occupied by the plaintiff or its officers for the purposes for which it was incorporated. The most that can be said is that the plaintiff intends that it shall be so occupied at some time; but to all appearance the time of such occupation is left wholly indefinite, and there is nothing to prevent the plaintiff

from changing its plans and alienating the property whenever it pleases. Without insisting on the strictest and most literal interpretation of the word "occupied," as found in the third clause, we cannot avoid the belief that some actual appropriation of the land to the purposes for which the plaintiff was incorporated must be unequivocally shown, in order to exempt it from taxation, and that an intent to do so at some wholly indefinite future time is not sufficient for that purpose. It should at least appear that it had begun to build. *New England Hospital v. Boston*, 113 Mass. 518. In other words, the exemption under the third clause, instead of being absolute as it is under the seventh, is conditional, and at the date of the tax in controversy the condition had not been fulfilled.

These considerations are decisive against the plaintiff in the present position of the case. Whether its claim to exemption from taxation, as to this lot of land, could be maintained, if the proposed school buildings had been erected, and appropriated to the uses described in the articles of association, is a question upon which we express no opinion.

Judgment for the defendant.

NANCY DICKASON vs. ANDREW WILLIAMS.

Suffolk. March 8. — July 8, 1880. ENDICOTT & SOULE, JJ., absent.

Land subject to a mortgage was conveyed by the mortgagor, the grantee assuming and agreeing to pay the mortgage. The grantee subsequently conveyed the land to the mortgagee by a deed which recited that the conveyance was subject to the mortgage. *Held*, that the mortgage was thereby merged; and that the mortgagee could not maintain an action against the mortgagor on the mortgage note, although the value of the land, at the time of the last conveyance, was less than the amount of the mortgage.

CONTRACT upon a promissory note for \$3000, dated March 29, 1870, payable to the plaintiff or order five years after date, and signed by the defendant. Writ dated November 2, 1878. The answer admitted the making of the note, but averred that it was a mortgage note, and that the mortgage had merged. At the

trial in the Superior Court, before *Wilkinson, J.*, the following facts appeared in evidence:

The note sued on was secured by a mortgage deed, containing the usual power of sale, of land on Henchman Street, in Boston, delivered by the defendant to the plaintiff on March 29, 1870. The defendant conveyed the land to John and Bridget Wills, by deed dated February 5, 1874, which contained these words: "And I do hereby for myself and my heirs, executors, and administrators covenant with the said grantees and their heirs and assigns that I am lawfully seised in fee simple of the granted premises; that they are free from all incumbrances, excepting a mortgage thereof for \$3000, which, with the interest thereon, the grantee assumes and agrees to pay." John and Bridget Wills conveyed the land to the plaintiff by a deed dated September 30, 1878, in which the consideration named was \$3500, and which contained these words: "The above conveyance is made subject to a mortgage of \$3000, which mortgage forms part of the above consideration." After the date of the writ in this action, the plaintiff conveyed the land to Dennis Winter-son. The plaintiff also introduced testimony to prove that the market value of the land when conveyed to her by John and Bridget Wills was not over \$2500, and it was admitted that the plaintiff paid nothing to John and Bridget Wills for said conveyance.

Upon these facts, the judge ruled that the plaintiff's claim against the defendant for the balance of the note over and above the market value of the land on September 30, 1878, was not extinguished. The jury returned a verdict for the plaintiff for \$707.95; and at the request of the defendant, the judge reported the case for the determination of this court. If the ruling was right, judgment was to be entered on the verdict; otherwise, the verdict was to be set aside, and a new trial ordered.

H. N. Shepard, for the plaintiff.

J. A. Maxwell, for the defendant.

AMES, J. It appears from the report that the note in suit, which was for \$3000, was given by the defendant to the plaintiff, and was secured by a mortgage upon certain premises in Henchman Street in Boston. The note and the mortgage were of the

same date, and there is no intimation of any other mortgage on the property. Some years afterwards, and before the note became due, the defendant conveyed the property to John and Bridget Wills, subject to the mortgage, it being recited in the deed that the grantees assumed and agreed to pay the mortgage. The effect of this transaction was to impose upon the grantees, by their acceptance of such a deed, a duty to make that payment, upon which the law would imply a promise to do so. *Pike v. Brown*, 7 Cush. 133. *Braman v. Dowse*, 12 Cush. 227. *Jewett v. Draper*, 6 Allen, 434. Subsequently, and after the maturity of the note, these grantees, in consideration of \$3500, conveyed the mortgaged property to the plaintiff subject to the mortgage of \$3000, "which mortgage forms part of the above consideration." In other words, the plaintiff repurchased the property, or took it back, and part of the price of this repurchase was the debt or claim which she at the time held against the same property. The plaintiff accepted a deed, which on its face imported that the amount due to her upon this note, which John and Bridget Wills had become liable to pay, was reckoned and included in the consideration for that very deed. This mode of dealing operated as a payment of the mortgage debt, by a party legally bound to pay it, to a party entitled to receive it. Upon these facts, the same person who held the mortgage has become the holder of the equity of redemption, and there being no intervening incumbrance or outstanding interest in any other person, the mortgage is merged and the debt extinguished. 2 Washb. Real Prop. (4th ed.) 193, and cases there cited.

Verdict set aside, and new trial ordered.

GUSTAVE AMSINOK & another *vs.* AMERICAN INSURANCE
COMPANY.

SAME *vs.* BOYLSTON MUTUAL INSURANCE COMPANY.

SAME *vs.* NEW ENGLAND MUTUAL INSURANCE COMPANY.

Suffolk. March 18, 1879. — July 10, 1880. AMES & LORD, JJ., absent.

One who has made an oral contract to purchase a vessel has an insurable interest in her, notwithstanding the statute of frauds.

In an action on a policy of marine insurance, evidence of a deviation from the voyage insured, by an unreasonable delay in prosecuting it, is admissible under a general denial in the answer.

THREE ACTIONS OF CONTRACT upon policies of marine insurance. At the trial in this court, before *Morton, J.*, the jury returned a verdict for the plaintiffs; the case was reported for the consideration of the full court, and appears in the opinion.

A. S. Wheeler & E. W. Hutchins, for the defendants.

L. S. Dabney & R. H. Dana, Jr., for the plaintiffs.

ENDICOTT, J. Upon the facts reported, the court is of opinion that Machado had an insurable interest in the vessel at the time the policies attached, even if we assume that they took effect on July 5, 1876, the day of their date. On that day, the plaintiffs, as agents for Machado, made an oral agreement in New York with the owners of the vessel for her purchase for the sum of \$11,000, payable on delivery of a proper bill of sale; and, having previously ascertained that the defendants would insure her, they gave directions to have the insurance closed. The policies were written on that day; the precise time of their delivery does not appear. The oral contract to purchase was reduced to writing and signed by the plaintiffs and the owners on July 7; and a portion of the purchase money was paid on that day. Possession was taken by Machado, the balance due was paid, and a bill of sale was duly executed to a third person in trust for Machado, who was a foreigner.

It is conceded by the defendants that Machado was the only person whose interest was insured, as appears by the declarations and the policies. But they contend that he had no insurable interest on July 5, for at that time he had only an oral contract for the purchase of the vessel; and that such a contract, being

within the statute of frauds, and incapable of being enforced, gives no insurable interest.

But the oral contract to purchase was not void or illegal by reason of the statute of frauds. Indeed, the statute presupposes an existing lawful contract; it affects the remedy only as between the parties, and not the validity of the contract itself; and where the contract has actually been performed, even as between the parties themselves, it stands unaffected by the statute. It is therefore to be "treated as a valid subsisting contract when it comes in question between other parties for purposes other than a recovery upon it." *Townsend v. Hargraves*, 118 Mass. 325, 336. *Cahill v. Bigelow*, 18 Pick. 369. *Beal v. Brown*, 13 Allen, 114. *Norton v. Simonds*, 124 Mass. 19. See also *Stone v. Dennison*, 13 Pick. 1. Machado had under his oral agreement an interest in the vessel, and would have suffered a loss by her injury or destruction. *Eastern Railroad v. Relief Ins. Co.* 98 Mass. 420. This interest he could have assigned for a valuable consideration, and, if he had assigned it, all the rights afterwards perfected in him would have enured to the benefit of his assignee. *Norton v. Simonds*, *ubi supra*. The case of *Stockdale v. Dunlop*, 6 M. & W. 224, relied upon by the defendants, does not sustain their position, for reasons which are stated in *Townsend v. Hargraves*, *ubi supra*.

The several policies of the defendants insure the ship on a voyage "at and from New York, via Bangor, to St. Michael, Western Islands." She left New York on September 3, and arrived at Bangor on September 13, where she took in additional cargo; from that port she sailed on October 27, and was lost on her passage to St. Michael. The defendants offered evidence of unreasonable delay at Bangor, where the ship remained for forty-three days, contending that, under the general denial of the answer, they could show that she did not sail on the voyage insured; in other words, that there was a deviation.

Any departure from the route named in the policy to a port or place not named, and any delay in prosecuting the voyage, without necessity or just cause, or any delay at a port named in the policy, for the prosecution of business not connected with the business of the voyage, or any unreasonable delay at such port in prosecuting the business of the voyage, is a deviation. Whether

the risk is increased thereby is immaterial. The assured has no right to substitute a different voyage for that which is insured, and can only recover for a loss sustained while the ship is prosecuting the voyage named in the policy ; and if she has deviated prior to the loss, she is not then prosecuting the voyage for which she was insured. Whenever, therefore, she departs from the route, or delays in the prosecution of it, it is incumbent on the assured to show that the departure was caused by necessity, or that the delay at a port named in the policy was reasonable under the circumstances in order to accomplish the objects of the voyage. *Burgess v. Equitable Ins. Co.* 126 Mass. 70, and cases cited. *African Merchants v. British Ins. Co.* L. R. 8 Ex. 154.

The declaration in each of these cases alleges that the defendant insured the ship, "on a voyage at and from New York, via Bangor, to St. Michael, Western Islands ; and while proceeding on said voyage said ship was wrecked, and totally lost by the perils and dangers of the seas." These are necessary allegations, which the plaintiff is bound to establish in order to recover, namely, that the ship was insured on that voyage, and while prosecuting it she was lost by the perils of the sea. The answers admit that the defendants insured the ship for that voyage, but they contain a general denial of each and every other allegation in the declaration. In this state of the pleadings, the plaintiffs introduced evidence to prove that the ship was prosecuting the voyage named in the policy when she was lost ; that she sailed from New York to Bangor, and from Bangor to St. Michael, and was totally lost between those ports.

We are of opinion that the defendants should have been allowed to rebut and control that evidence, which was a necessary part of the plaintiff's case, by showing that the ship did not sail on the voyage insured, that there was a deviation from that voyage by unreasonable delay at Bangor ; and evidence of deviation, by departing from the route, or by unreasonable delay in prosecuting it, is appropriate to prove that the voyage actually prosecuted was not the voyage insured. It certainly would have been competent to prove, under the general denial, and in reply to the plaintiffs' evidence, that the ship went to Portland, and not to Bangor ; and it is equally competent to prove that she deviated from her route by unreasonable delay at Bangor. The

defendants rest their defence, not upon matter in discharge and avoidance, but upon a denial of the allegations in the declaration, to support which evidence must be introduced; and we are of opinion that the ruling which excluded the evidence offered by the defendants, as inadmissible under the answer, was erroneous. A denial of each and every allegation in the declaration puts in issue every fact which the plaintiff must prove to make out a *prima facie* case. Gen. Sts. c. 129, § 17. *Mulry v. Mohawk Valley Ins. Co.* 5 Gray, 541. *Lincoln v. Lincoln*, 12 Gray, 45. *Boston Relief & Submarine Co. v. Burnett*, 1 Allen, 410. *Davis v. Travis*, 98 Mass. 222. *Brigham v. Aldrich*, 105 Mass. 212. *Hill v. Crompton*, 119 Mass. 376. *Mosler v. Potter*, 121 Mass. 89. Of these cases *Lincoln v. Lincoln* most nearly resembles the case at bar. It was there held that, under an answer denying the making of a promissory note, an alteration after it was signed might be proved; and it was said by Mr. Justice Metcalf, in delivering the opinion, "No law, of which we have any knowledge, requires a defendant to give a plaintiff notice, written or oral, of the evidence which he intends to produce by way of rebutting that which the plaintiff must produce in order to support his case." The question is to be decided under our own system of pleading, as expounded by this court, and it is immaterial what may be the rule at common law, or under the practice in England.*

In this aspect of the case, we express no opinion upon the other questions raised in the report, and argued at the bar. They all relate to the admission of evidence, and to prayers for instructions, in regard to the unreasonable delay of the ship at New York. Many of them may not arise at a new trial, and, by the terms of the report, if any of the rulings made were erroneous, the verdicts are to be set aside. As we decide that Machado had an insurable interest in the ship when the policies attached, and that it was open to the defendants to show that there was unreasonable delay at Bangor, the cases must stand for trial upon the questions of delay at New York and at Bangor.

Verdicts set aside.

* On this point the plaintiffs cited *Tidmarsh v. Washington Ins. Co.* 4 Mason, 439, 441; 2 Greenl. Ev. §§ 395, 399, 403; Chit. Pl. (11th Am. ed.) 515 a.

ADELE G. THAYER vs. NATHANIEL THAYER, trustee.

Suffolk. March 26, 1879. — July 10, 1880. AMES & LORD, JJ., absent.

A widower devised the residue of his estate to his brother, in trust, to take from the income what he should deem necessary for the support and education of the testator's only son during his minority; to add the excess of income over the sum expended to the principal of the fund; and, upon the son's coming of age, to pay over to him, for his own use, one half of the principal with accumulations, the other half to be held in trust to pay over the entire income to the son during his life, and, at his death leaving issue, to transfer the principal to such issue as he should by will direct, or, in default of such issue, to the son's children in equal shares; in case of the son's death before coming of age, or of his subsequent death leaving no issue, the property then held in trust was to go to the trustee. The testator subsequently made a codicil to his will, which, after reciting that he was about to marry C., and making provision for her, proceeded as follows: "In case I shall leave any child, or children, or posthumous child, born of C., then, and in such case, I give to each and every such child the sum of \$250,000, the same to be held in trust by my brother until such child attains the age of twenty-one years, and if daughter or daughters, the same is to be held in trust so long as they shall live, and the income only to be paid to them for their own sole and separate use, and if son or sons, one half, with the accumulated income, to be paid over to them, and the other half to be held in trust, on the same terms as the property I have left my son in my will." *Held*, that the reference to the will in the codicil governed the provisions for daughters as well as those relating to sons; that the trustee could devote such portion of the income as was needed for the support and education of a daughter during her minority; that the residue should be added to the principal; that, after a daughter came of age, she was not entitled to any portion of the accumulated income, or to have the trust terminated, but only to the income during life of the principal and accumulated income, with a power of disposal by will among her issue, if any.

BILL IN EQUITY, filed January 21, 1879, alleging that the plaintiff's father, John E. Thayer, died in 1857, leaving a will and codicil, which were duly admitted to probate; that by the will certain provisions were made for the testator's then only child, Ebenezer Francis Thayer, who had since died under age and unmarried; that by the codicil, dated September 25, 1855, the testator, after reciting that a marriage was about to be solemnized between himself and Cornelia Adeline Granger, made the following provisions: "In case I shall leave any child or children, or posthumous child, born of said Cornelia Adeline, then, and in such case, I give to each and every such child the sum of two hundred and fifty thousand dollars, the same to be

held in trust by my brother, Nathaniel Thayer, until such child attains the age of twenty-one years, and if daughter or daughters, the same is to be held in trust, so long as they shall live, and the income only to be paid to them for their own sole and separate use, and if son or sons, one half, with the accumulated income, to be paid over to them, and the other half to be held in trust, on the same terms as the property I have left my son, Ebenezer Francis Thayer, in my will."

The bill further alleged that the marriage referred to in this codicil was duly solemnized on October 2, 1855; that the plaintiff was the only issue of the marriage, having been born on November 20, 1857, after the decease of the testator; that the legacy of \$250,000, given in said codicil for her benefit, was duly paid to the defendant as trustee, on June 14, 1858; that when the plaintiff became of age there was in the hands of the defendant as trustee, in addition to the principal, the sum of \$512,770, which represented the accumulated income of the trust fund.

The bill also alleged that the plaintiff was entitled to the whole of the income during her minority; that the same ought now to be paid to her; that, as she was entitled to the income of the principal during her life, with power of disposal by will, and as, in default of such disposal, the principal vested in her heirs at law, there was no further occasion for the intervention of a trustee, and the principal ought to be paid to her.

Annexed to the bill were copies of the will and codicil, the material parts of which, not above set forth, appear in the opinion.

The trustee answered, admitting the facts set forth in the bill; but denying that the plaintiff was entitled to more than the income of the principal and accumulated income, with power of disposal among her children by will.

The case was heard on the bill and answer by *Endicott, J.*, and reserved for the consideration of the full court.

W. G. Russell & W. Minot, Jr., (J. L. Thorndike with them,) for the plaintiff. 1. Nothing is to be found in the codicil which affects the plaintiff's legacy by reference to the will, or which requires or justifies any such reference for the ascertainment of her rights and interest. The provision for a daughter ends with the words "separate use," and is full, clear, and unambiguous.

What follows applies only to a son's legacy. The first words used by the testator are words of absolute gift, "I give to each and every such child the sum of \$250,000." This gift is restricted by what follows, but, except so far as it is thus restricted, the absolute gift prevails. *Saunders v. Vautier*, Cr. & Phil. 240. *Lassence v. Tierney*, 1 Macn. & Gord. 551. *Mayer v. Townsend*, 3 Beav. 448. *Grant v. Grant*, 3 Yo. & Col. Exch. 171. *Kellett v. Kellett*, L. R. 3 H. L. 160. *Josselyn v. Josselyn*, 9 Sim. 68. *Holden v. Blaney*, 119 Mass. 421. The words next used are, "the same to be held in trust by my brother, Nathaniel Thayer, until such child attains the age of twenty-one years." These words, restricting the previous gift, do not deprive the daughter of the beneficial interest in it which had already been given to her, but cut down the gift only by vesting the legal interest in the trustee during her minority. The gift is in terms to the child and not to the trustee, and in this regard it stands in marked distinction from the other gifts in the will and codicil. If there were no other provision applicable to her minority, the right to the income during that period would have vested in her at the testator's death, the legal estate only being in the trustee. The next words are, "and if daughter or daughters, the same [the legacy of \$250,000] is to be held in trust so long as they shall live, and the income only to be paid to them for their own sole and separate use," and then comes the provision for sons. The duration of the trust for daughters is "so long as they shall live;" there is nothing to limit it to the time after they attain twenty-one. The trust expressly is that the income shall be paid to them. The plaintiff is therefore entitled to the income which has accumulated during her minority. *Williams v. Bradley*, 3 Allen, 270. *Montgomerie v. Woodley*, 5 Ves. 522. *In re Peek's Trusts*, L. R. 16 Eq. 221. *Grant v. Grant*, *ubi supra*. *Nicholls v. Osborn*, 2 P. Wms. 419. *Taylor v. Johnson*, 2 P. Wms. 504.

2. The trust ceases at the death of the daughter. There is no provision for her issue, and no gift over. The absolute gift to the daughter takes effect, except so far as it is restricted by the direction that the legacy shall be held in trust during her life. Subject to the trust for her life, the legacy belongs to her, and is subject to her disposal by will or deed. *Campbell v.*

Brownrigg, 1 Phil. 801. *Ring v. Hardwick*, 2 Beav. 352. *Winckworth v. Winckworth*, 8 Beav. 576. *Whittell v. Dudin*, 2 Jac. & Walk. 279, and cases above cited.

The right to the income for life, and, subject to that, the legacy itself, being vested absolutely in the daughter, she has the whole beneficial interest in the legacy, and is therefore entitled to determine the trust and call for a transfer of the fund. *Inches v. Hill*, 106 Mass. 575. *Barford v. Street*, 16 Ves. 135. *Fredrick v. Hartwell*, 1 Cox Ch. 193. *Woodmeston v. Walker*, 2 Russ. & Myl. 197. *Josselyn v. Josselyn*, 9 Sim. 63. *Saunders v. Vautier*, Cr. & Phil. 240. *Devall v. Dickens*, 9 Jur. 550. *Gardiner v. Young*, 34 L. T. (N. S.) 348. *Campbell v. Home*, 1 Yo. & Col. Ch. 664. *Firmin v. Pulham*, 2 DeG. & Sm. 99.

3. The reference in the codicil to the will relates only to the half of a son's legacy that was to continue in trust after the division. Examining the will and attempting to apply the trusts to the codicil, this position is confirmed. The will contains two distinct trusts: 1. A trust of the whole residue during E. F. Thayer's minority; 2. A trust of one half of the residue and accumulations, which begins upon his attaining twenty-one, and provides for the ultimate transfer of that half, after his death, among his issue, or, in default of issue, to the defendant. The reference in the codicil is to the latter of these two trusts. The fund to be held in trust is "the other half" of a son's legacy, and the trust referred to is naturally that of the half of the residue that is to be held in trust for E. F. Thayer after the division, and not the trust of the whole residue, which was to furnish maintenance and an expenditure of \$50,000 per annum out of the income during minority. But if the grammatical construction could be so strained, the application of the reference to the will to the daughter's legacy involves still greater difficulty. The reference to the trusts is general, and cannot be limited to some, or to such modification of them as the defendant chooses. If the reference applies during minority, we have a trust to pay \$50,000 per annum out of the income of \$250,000, and accumulate the rest, and at twenty-one to divide principal and accumulations, and to pay over one half and retain the other in trust forever after for certain purposes. This would be repugnant, appended to an express trust by which the income

only is to be paid over, and which is limited to the daughter's life. If the reference is only to the trusts after E. F. Thayer attained twenty-one, then there is no trust for accumulation. And in no event can the trust, whatever it be, extend beyond the daughter's life to which it is in terms limited.

R. Olney, for the defendant.

ENDICOTT, J. The decision of the questions raised in this case depends upon the construction to be given to the clause in the first codicil to the testator's will, wherein he makes provision for after-born or posthumous children. As this clause and the other clauses of the codicil refer to his will, a brief recital of the provisions of the will, to which these clauses refer, is necessary.

When the will was made, in May 1855, the testator was a widower, having but one child, Ebenezer Francis Thayer, then in his eighteenth year. He had a large estate, and left numerous legacies to relatives and friends, and to public institutions; and all the residue, both real and personal, he left to his brothers, Nathaniel Thayer and Christopher T. Thayer, in trust for the use and benefit of his son. The trustees, whom he also appoints as guardians, are requested to place at the disposal of his son, during his minority, the sum of six thousand dollars annually, for charitable purposes; and having given directions in regard to the use and occupation of his estates in Boston and Brookline, not necessary to recite, he orders and directs his trustees to take from the income of the trust estate what they may think necessary for the support and education of his son, and for the charitable purposes above named, and for the repairs and other expenses upon his houses and buildings, and for the labor upon his estate in Brookline, and for all taxes and other expenses, a sum not exceeding fifty thousand dollars in any one year, and all the income not needed for these objects to be added to the principal and duly invested, until his son attains his majority. If he should die before reaching the age of twenty-one years, then all the estate so held in trust the testator gives to his brother, Nathaniel Thayer, absolutely. But if the son attains his majority, one half the trust estate and one half the accumulations thereon during his minority are to be paid over to him absolutely, the

other half to remain in trust, and the income, as it shall accrue, to be paid to him during his life; and upon his decease, leaving issue, the half so held in trust shall be paid over to his children equally, or to such of his issue as he may direct in his last will, and, in default of issue, to Nathaniel Thayer absolutely.

The scheme of the testator in providing for his son is simple and plain, though the order in which the provisions are stated is somewhat confused. He intended that during his son's minority a certain sum should be placed in his hands for charitable purposes; that such sum as the trustees deemed proper should be devoted to his support and education; that the estates in Brookline and Boston, which were to be his son's, should be suitably maintained; and that the rest of the income remaining each year should be added to the trust fund, until he reached the age of twenty-one years. The attainment of his majority marked a period in the trust, when a change was to take place in the management of the fund, and a large amount of money was to be paid to the *cestui que trust*. The accumulations were then to cease. One half the whole trust fund was to be the son's absolutely, to use and dispose of at his pleasure; the other half to remain in trust, he to receive the income during life, and at his death the principal to go to his children, with a limited power in him to point out by will to whom among his children or issue it should be paid over.

While the testator thus intended that his son should have a large estate absolutely within his control, if he attained twenty-one years of age, and an ample income from a trust fund, with remainder to his children, he in substance says: "But if my son should die before he is twenty-one, I prefer that all the property should descend to my brother, Nathaniel Thayer, rather than to the heirs at law of my son; and if he should die after he is twenty-one, leaving no issue, I also prefer that all the trust fund, not given to my son absolutely, shall go to my brother Nathaniel Thayer, and not to the heirs at law of my son." The testator does not seem to have contemplated the possibility of his son marrying, having issue, and dying before reaching the age of twenty-one years.

By the codicil to his will, which was made on September 25 of the same year, it appears that his situation had changed, and

that he intended in a few weeks to be again married. And in case he should die before his intended marriage, he gives two hundred and fifty thousand dollars in trust to his brother Nathaniel Thayer, for the benefit of his intended wife, the income to be paid to her during life, and upon her decease the principal sum "shall be paid over to the trustee or trustees, who are to hold by my will the rest and residue of my estate for the benefit of my son, and for other purposes, upon the same conditions, trusts and limitations as the rest of my property is held;" and in case he is married, then, instead of the previous provision, he gives in trust to Nathaniel Thayer the sum of five hundred thousand dollars, the income of the same to be paid over to his wife during her life, with power in her to dispose of one hundred thousand dollars of the same by will; and upon her decease, the principal is to be paid over "as before directed, to the trustee or trustees, who are to hold the rest and residue of my estate."

He then makes the following provision for children that may be born of his intended marriage: "In case I shall leave any child or children, or posthumous child, born of said Cornelia Adeline, then and in such case I give to each and every such child the sum of two hundred and fifty thousand dollars, the same to be held in trust by my brother, Nathaniel Thayer, until such child attains the age of twenty-one years, and if daughter or daughters, the same is to be held in trust so long as they shall live, and the income only to be paid to them for their own sole and separate use, and if son or sons, one half, with the accumulated income, to be paid over to them, and the other half to be held in trust, on the same terms as the property I have left my son, Ebenezer Francis Thayer, in my will."

The plaintiff, a daughter of the testator, and only child of the second marriage, born after his decease, having arrived at the age of twenty-one years, brings this bill against the defendant, who holds the fund of two hundred and fifty thousand dollars, given to him in trust for her benefit under this clause, together with the accumulations thereon during her minority; and she contends that the income was payable to her as it accrued during her minority, and was not to become a part of the principal fund, and she is now entitled to receive it. She also

contends, that the principal sum of two hundred and fifty thousand dollars was given for her benefit only; that she can dispose of it by will, and in default of a will it would descend to her heirs; that there is no further occasion for a trustee, and the trust should be terminated, and the fund paid over to her.

The defendant, on his part, contends that he holds the fund for the benefit of the plaintiff upon the same terms as the will declared the property should be held, which the testator left to trustees for the benefit of his son Ebenezer Francis Thayer; that the accumulations during her minority have become a part of the trust fund; that it is his duty under this provision of the codicil to pay over to her for life the income of the fund, as it now stands, and upon her decease to divide the sum equally among her children, or among such of her issue as she may by will direct.

It is to be observed that the concluding words of the clause of the codicil, providing for posthumous children, viz. "on the same terms as the property I have left my son, Ebenezer Francis Thayer, in my will," clearly refer to the provisions contained in the residuary clause of the will, which establish a trust for the benefit of his living son, and these provisions are thus made by reference a part of the codicil. They are also directly connected with, and are manifestly intended to refer to some, if not to all, of the provisions which precede them, establishing trusts in the hands of Nathaniel Thayer for the benefit of the children by the intended marriage. Whether they refer to the trusts previously declared for sons, or for daughters, or for both, to whatever trusts they refer, Nathaniel Thayer is to hold such trusts, upon the same terms, and is to execute and administer them in all essential particulars as the trust for the benefit of Ebenezer Francis Thayer is to be held and administered. That these words apply to the trust created under this clause, for every son or posthumous son, we cannot doubt, because, omitting the provision as to daughters, the clause would then read, after naming the sum of two hundred and fifty thousand dollars, "to be held in trust by my brother Nathaniel Thayer, until such child attains the age of twenty-one years . . . and if son or sons, one half, with the accumulated income, to be paid over to them, and the other half to be held in trust on the

same terms as the property I have left my son Ebenezer Francis Thayer in my will." The mention of the age of twenty-one years, and of the payment after that of one half, with the accumulations, and of the other half to remain in trust, followed by the words "on the same terms," &c., show unmistakably, and it is not denied by the plaintiff, that the testator intended to create a trust on the same terms, with the same privileges and limitations, for his future sons as he had for his living son. And the only question to be settled here is, did the testator intend that these words should apply as well to the gift in trust created for the benefit of a daughter, as to the gift for the benefit of a son of the second marriage.

What the testator intended is to be ascertained, if possible, from the language he has used in this clause, and if it is clear that he did not intend the concluding words to apply to the gift to daughters, that intention cannot be controlled or modified by the intentions expressed in other parts of the will or codicil in regard to the management or final disposition of the trust fund created in the residuary clause of the will. On the other hand, if it is clear, from the language used in the clause itself, explained by the reference to the will, that he did intend to put daughters on the same footing as sons in all respects, except that they should not have half of the trust fund absolutely at twenty-one years of age, we have no occasion to seek elsewhere for his intention. But if the language is capable of two constructions, and it is doubtful which he intended, we may refer to other portions of the will and codicil to determine the true construction and ascertain his intention. *Lassence v. Tierney*, 1 Macn. & Gord. 551. *Cummings v. Bramhall*, 120 Mass. 552. *Loring v. Sumner*, 23 Pick. 98, 103. *Metcalf v. Framingham Parish*, 128 Mass. 370.

Taking the whole clause by itself, in connection with that part only of the will to which it refers, a majority of the court is of opinion that the concluding words above quoted comprehend and attach themselves to each preceding provision, and that the trusts for daughters and for sons are to be held by the trustee on the same terms as the trust for Ebenezer Francis Thayer, excepting that the daughters are not to receive one half of the principal on arriving at twenty-one years of age.

Let us take the provisions in their order : " I give to each and every such child the sum of two hundred and fifty thousand dollars, the same to be held in trust by my brother Nathaniel Thayer until such child attains the age of twenty-one years." This applies in express terms to both sons and daughters. But the testator evidently did not intend that the trusts for either should terminate at that time ; for in the next sentence he provides that the trusts for daughters shall continue " so long as they shall live, and the income only to be paid to them ;" and that the trusts for sons shall continue in the one half of the accumulated fund not paid over to them at twenty-one years of age. We must presume that the testator had some purpose in using the words " until such child attains the age of twenty-one years," and in applying them equally to sons and to daughters. They are not to be rejected, as repugnant to the provisions which immediately follow, if we can find any cause for their insertion, or any explanation of their meaning, consistent with the other provisions of the clause. It is unusual, and would be unnecessary, to create a trust to continue only until a child arrives at the age of twenty-one years, unless some change in the management of the trust at that time is intended. The appointment of a guardian would accomplish for the protection of a child all that could be secured by such a trust. But the attainment of twenty-one years of age was a marked period in the trust which the testator had created in his will for his son, to which he refers in this clause, when a change in its management was to occur, and one half of the principal was to be paid to him absolutely. This, in connection with the concluding words of the clause, " on the same terms as the property I have left my son, Ebenezer Francis Thayer, in my will," discloses what was in the mind of the testator at the time, explains why he created a trust for both sons and daughters until they were twenty-one years of age, and shows that in making this provision, which, taken by itself, was unnecessary, he had a definite and distinct intention to establish a limit of a similar character, and for a similar purpose, in the trusts created for all the children of the intended marriage, as he had already established for his living son. Seeking, therefore, for the intention of the testator in the words

that he has used, and construing these words in connection with the closing sentence of the clause, we find that until sons or daughters attain the age of twenty-one years, the trusts created for their benefit shall be on the same terms as that created for his son Ebenezer Francis Thayer.

It is not denied by the plaintiff that the provision, "until such child attains the age of twenty-one years," applies to sons, because it is conceded that the terms of the trust for Ebenezer Francis Thayer apply to after-born sons; but, although daughters are equally and indeed expressly included within its provisions, it is denied that it applies to them, because it cannot change or modify the subsequent provision, that the trust for daughters is to continue as long as they shall live, and must therefore be rejected. But the construction we give to the provision rejects no words of the testator, but gives to all an intelligent meaning, which bears directly upon the terms of the trusts made for the benefit of any future child.

If the testator intended that the trusts created under this clause of the codicil, for sons and daughters alike till twenty-one years of age, should be held on the same terms as the trust for his son created in the will, the conclusion would seem to follow that, in extending these trusts beyond the age of twenty-one, he also intended to extend them upon the same terms. And this intention is manifested in the language that he uses. Having declared trusts for both sons and daughters until they reach the age of twenty-one years, he now intends to extend these trusts beyond the period of majority, and to make a distinction between sons and daughters, and he does it in these words: "And if daughter or daughters, the same is to be held in trust so long as they shall live, and the income only to be paid to them for their own sole and separate use, and if son or sons, one half with the accumulated income to be paid over to them and the other half to be held in trust on the same terms as the property I have left my son Ebenezer Francis Thayer in my will." The whole of this portion of the codicil, which makes different provisions for sons and daughters, must be considered in ascertaining the intention of the testator as to each. He is still dealing with the trusts, which he has previously declared for daughters as well as for sons, and he has regard

to the state of things existing after they are twenty-one years of age, for he has already made provision for them before that period; and he expresses his intention in one sentence, which points out the distinction or difference he desires to make between sons and daughters, viz. that the daughters shall have the income only during their lives, and the sons shall have one half the principal and the income of the other half during their lives. but we find nothing in the language which indicates that the testator intended that so much of the fund as is to be held in trust for each after majority is not to be held upon the same trusts, and is not to be administered in the same manner. The words, "the income only to be paid to" the daughters, are significant, and, although inartificial words, point to the fact that the daughters are not to receive any of the principal, and mark the difference between them and the sons, who are to receive one half of the principal, the other half to remain in trust. This difference does not affect the character of the trusts declared for both, but relates only to the amounts which are thenceforth to be held in trust for each; and while sons are to have at that time the privilege of receiving a moiety of the principal, this privilege is denied to the daughters. There is nothing in the grammatical construction of the sentence which limits the application of the closing words, "on the same terms," &c., to the trusts created for sons, or which prevents their application to all preceding portions of the clause. They are the concluding words of the whole clause, and not merely of the sentence which immediately precedes them, and it is only by so applying them that full force can be given to all the words of the testator.

The construction for which the plaintiff contends rejects the words, "until such child attains the age of twenty-one years," because they can have no effect to modify the provision for daughters, which immediately follows, and declares that the sum to be held in trust for daughters shall remain in trust during their lives. But for reasons already given these words cannot be thus rejected, but have an intelligent meaning, and aid in disclosing the intent of the testator. Upon the same construction we should be forced to the conclusion, that the testator, while he intended that a trust should be established

for a daughter during her life, failed to make any provision for the remainder on her death. And it also rests upon the assumption that the testator had concluded all he had to say about daughters when he stated that the income only of the trust fund should be paid to them during life. But this construction can only be attained by asserting that the concluding words apply to sons, and not to daughters, and by dividing into parts the single sentence in which he expresses his intention as to both, and then construing that part relating to daughters by itself and independently, without reference to what precedes or what follows.

It further assumes that the testator, while making, not only in his will, but by reference in this very clause of the codicil, the most precise directions as to the disposition of the principal of the shares of any and all sons, has left the disposition of the principal of the share of a daughter to a mere implication from the gift to her of the income for life, or to an inference of intention from the use of the general words giving the sum of two hundred and fifty thousand dollars, which words apply equally to sons and to daughters, and which, so far as they apply to sons, are clearly not to have an unqualified effect. And the result is to give to a daughter the absolute title and unlimited power of disposition of the whole principal of her share, while the testator gives such title and power to any son in only one half of his.

Nor is there any difficulty in executing and carrying out, in all essential particulars, the trusts thus created for both daughters and sons, in the same terms as the trust for his son set forth in the will. The provisions, as to the maintenance of the two estates in Boston and Brookline, which were by the will to belong to the son, and as to the sum for charity which was personal to him, have no application to the trusts created in the codicil for daughters or sons of the second marriage. But the trustee could properly devote such portion of the income as was needed for the education and support of a daughter during minority, as well as of a son, and add what remained to the principal. And, instead of paying over to the daughter one half of the principal on attaining the age of twenty-one, the trustee should retain the whole fund with its accumulations,

and pay over the income only during her life. In the case of a daughter, as well as of a son, from the time of attaining majority, the property remaining in trust would be held upon the same terms in every respect as the property given by the will in trust for the benefit of Ebenezer Francis Thayer.

Bill dismissed.

MARSHALL S. P. LAWS vs. WILLIAM L. BURT & others.

Suffolk. March 18. — July 10, 1880. AMES & LORD, JJ., absent.

The U. S. St. of March 1, 1847, § 2, which provides that "moneys taken from the mails" by theft or robbery, which come into the possession of any of the agents of the post-office department, shall be paid to the order of the Postmaster General, for the benefit of the rightful owner, applies to the proceeds of such moneys; and this court will not entertain a bill in equity brought by a person who had stolen money from the mails against a postmaster, to enforce a trust deed executed by the thief, by which he conveyed to the defendant the proceeds of such moneys, in trust to pay claims arising out of the theft, and to return the balance to the plaintiff.

MORTON, J. This is a bill in equity brought to enforce the trusts declared in a deed from the plaintiff to the defendant Burt, dated February 5, 1872. By this deed, the plaintiff conveys to Burt certain real estate in Boston and certain personal property, being principally deposits in several savings banks in Boston, upon the trusts that Burt shall apply the proceeds to pay all claims growing out of money and property stolen by the plaintiff from letters in the Boston post-office, and return any balance remaining to the grantor.

At the date of this transaction, the U. S. St. of March 1, 1847, was in force, which provides, in § 2, that "all moneys taken from the mails of the United States by robbery, theft or otherwise, which have come, or may hereafter come, into the possession or custody of any of the agents of the post-office department, or any other officers of the United States, or any other person or persons whatever, shall be paid to the order of the Postmaster General, to be kept by him as other moneys of the post-office

department, to and for the use and benefit of the rightful owner, to be paid whenever satisfactory proof thereof shall be made; and upon the failure of any person in the employment of the United States to pay over such moneys when demanded, the person so refusing shall be subject to the penalties prescribed by law against defaulting officers."

These provisions were substantially reenacted in the U. S. St. of June 8, 1872, and in the Revised Statutes of the United States. U. S. Rev. Sts. §§ 4050-4058.

By these provisions, the Postmaster General has the exclusive right to the custody of money or other property stolen from the mails and which comes into the possession of any officer of the United States or other person, and the exclusive jurisdiction to determine who are the rightful owners and to distribute it among them. No court and no individual by an agreement with the thief can take away this right or defeat this jurisdiction.

In the case at bar, it appeared at the hearing that the whole of the property transferred to Burt was the proceeds of money and property stolen by the plaintiff from the mails; and that at the time of the transfer Burt was the postmaster of Boston.

The plaintiff contends that the statutes do not apply, because the property which came to the possession of the defendant was not the identical money or property stolen from the mails. But we think this is too narrow a construction of the statute; and that it was intended to apply, at least in a case like this, where the stolen money can be traced, and in a changed form has come to the possession of an officer of the United States. Whether it has a more extensive application it is not necessary to inquire.

It could not reasonably be contended that, if the thief had deposited the stolen money in a bank, and then upon detection had given his check to the postmaster for the amount, the statute would not apply because the postmaster could not receive the identical bills or coin deposited. We have no doubt that the statutes intend that, when the amount stolen, in the same or a different form, comes into the possession of an officer of the United States, by a voluntary or involuntary restitution, the jurisdiction of the Postmaster General shall attach to it. This is clearly recognized in § 4058 of the Revised Statutes of the

United States, which provides that, "whenever the Postmaster General is satisfied that money or property stolen from the mail, or the proceeds thereof, has been received at the department, he may, upon satisfactory evidence as to the owner, deliver the same to him."

We are of opinion, that the statute applies to this case; and that, when the property named in the plaintiff's deed was transferred to and came to the possession of the defendant Burt, the jurisdiction of the Postmaster General attached. It became the duty of the defendant to pay it over to, or to hold it subject to, the order of the Postmaster General. The defendant could not legally make any contract with the thief, which would defeat that jurisdiction, or relieve him of the duty imposed by statute. The trusts which the parties attempted to create were therefore illegal and void, and cannot be enforced. The defendant Burt holds the property upon the trusts imposed and created by the law. He has no right to determine who is entitled to the property, nor can this court determine that fact, which is within the exclusive jurisdiction of the Postmaster General.

For these reasons, this bill cannot be maintained; and it is not necessary to consider the question how far in any event a court of equity could be invoked to aid a thief to regain the possession of stolen property with which he had parted.

Bill dismissed.

J. Fox, for the plaintiff.

J. E. Avery, for a claimant of part of the fund.

G. P. Sanger, United States District Attorney, in support of a motion to dismiss the bill.

CHARLES DOLAN vs. ALBERT THOMPSON & others.

Suffolk. March 2. — July 16, 1880. ENDICOTT & SOULE, JJ., absent.

IF A. brings an action upon a promissory note against B., who sets up in defence that he has paid the note and that he has a claim in set-off against A. larger than the amount of the note, and the jury return a verdict for B. under his declaration in set-off, the verdict is conclusive that A. had a cause of action against B., and the latter cannot maintain an action against A. for malicious prosecution founded upon such cause of action.

LORD, J. The plaintiff brings his action against these defendants for a malicious prosecution. The alleged malicious prosecution was an action commenced on March 5, 1874, upon two promissory notes signed by this plaintiff. There is also an allegation in this declaration that the defendants without any just cause commenced proceedings in bankruptcy against this plaintiff, subsequently upon their own motion dismissed; but whether this allegation is regarded as a substantive cause of action, or simply as incident to and an aggravation of the suit upon the notes, it is immaterial to consider; whether it be the one or the other, the result must be the same.

In the suit brought by the defendants against the plaintiff, he rested his defence upon two grounds; first, that he had paid both the notes, and the payment of the two notes was in the same mode, and there was no claim that either of said notes was paid and not the other, the agreement set up by the defendant being the same as to each note; second, that he had a claim in set-off against the present defendants, larger than the amount of the two notes. That claim was denied by the present defendants, and, although they admitted their liability to some one for the amount of that claim, they alleged and undertook to establish the fact that their liability was to a son of the plaintiff, against whom they had also claims. It will be perceived that several issues were involved in that trial. If the notes had been paid, the plaintiffs had no cause of action, and perhaps it might be assumed no probable cause of action. If they had not been paid, whether the defendant had a claim against the plaintiffs or not, and whether to a greater or less amount than the amount of the notes, they had an absolute

right of action upon the notes. The verdict in that case is conclusive that the plaintiffs had a cause of action. The legal effect of the finding of the jury was necessarily that the parties had mutual demands against each other. The verdict is decisive that the claim of this plaintiff that the notes had been paid was not sustained; for one of the notes having been withdrawn from the suit, the jury have found that the amount which the plaintiff contended had been appropriated to the payment of that note had never been so appropriated, and, under his declaration in set-off, allowed to him the amount of his claim to that extent. The subsequent agreement between the parties, by which a portion of the damages awarded to the defendant on his declaration in set-off was appropriated to the payment of such note, is further illustrative of the same fact.

It follows, therefore, as matter of law, that the present defendants had a cause of action against the plaintiff, upon which they might commence a suit at law or proceedings in bankruptcy, or both.

Exceptions overruled.

I. W. Richardson & J. W. Keith, for the plaintiff.

R. M. Morse, Jr., (J. H. Hardy with him,) for the defendants.

GEORGE W. GALE & another vs. LUTHER BLAIKIE & others.

Middlesex. Jan. 18. — July 1, 1880. COLT & LORD, JJ., absent.

A person who furnishes materials, at different times, under one contract, in the erection of a building, loses his lien, under the Gen. Sts. c. 150, § 5, if he neglects to file his statement of the amount due him within thirty days after the last item is furnished which is actually used in the erection of the building.

PETITION, under the Gen. Sts. c. 150, to enforce a mechanic's lien for materials furnished in the erection of a building in Cambridge. After the former decision, reported 126 Mass. 274, the case was tried in the Superior Court, without a jury, before *Gardner, J.*, who reported the case for the determination of this court, in substance as follows :

It appeared that, in December 1875, the petitioners agreed verbally with Blaikie, one of the respondents, then the owner of the land described in the petition, to furnish all the lumber and material required in the erection of the building in question; that, in pursuance of this agreement, the petitioners furnished and delivered to Blaikie, from time to time as ordered, materials from December 21, 1875, to June 20, 1876, inclusive; that no payment was made or demanded until after the latter date; that, while the building was in process of erection, Blaikie conveyed the land with the building thereon by mortgage to one Grover, to secure the payment of a certain sum of money, in February 1876, and, during the same month, conveyed the same, subject to the mortgage, to one Gooch, both of which deeds were duly recorded in their order in that month; that the petitioners had no actual notice of either of these conveyances, and continued to furnish the materials to Blaikie down to June 20, 1876; that the materials were all furnished and delivered in pursuance of the agreement of December 1875, and were all actually used in the construction of the building except the last item of the account, a quantity of cement, furnished on June 20, 1876, which was delivered to Blaikie, at his request, on a lot owned by him, adjoining the premises described in the petition, but was subsequently attached by a creditor of Blaikie and carried away, and no part of this item was used in the construction of the building; that the petitioners had no knowledge or notice that this cement had been taken away until after the commencement of this suit; that the date of the next previous item was June 10, 1876, and this was actually used in the construction of the building; and that the proper certificate of lien was filed in the office of the city clerk of Cambridge on July 20, 1876.

The respondents asked the judge to rule that the certificate was not filed within the time required by law, and the petition should be dismissed.

The judge declined to rule as requested, but did rule that the contract was sufficient to sustain the lien as to all the items except that of June 20, both as against the mortgage and the deed, and that the certificate, being filed July 20, 1876, was filed properly within the time required by law, provided the cement

delivered on June 20, 1876, was actually furnished by the petitioners under their agreement with Blaikie of December 1875, for said building; and on the above facts and rulings found that the lien was established for the sum of \$932.64, with interest from the date of the petition, which sum did not include the value of the item of June 20, 1876.

Judgment was to be entered for the petitioners in the sum of \$932.64, with interest from the date of the petition, if the ruling was right; otherwise, for the respondents.

J. W. Hammond, for the respondents.

G. F. Piper, for the petitioners. The materials in this case were furnished under a contract which was not completed until June 20, 1876, when the cement was furnished. Although the petitioners have no lien for this item of their account, as it was not actually used in the erection of the building, yet this does not prevent their maintaining a lien for the other items. The Gen. Sts. c. 150, § 5, provide that the lien shall be dissolved, unless the person desiring to avail himself thereof files the statement in the city or town clerk's office "within thirty days after he ceases to furnish materials for" a building, and do not provide that the lien is lost unless the statement is filed within thirty days after he ceases to furnish materials which actually go into a building. To adopt the construction contended for by the respondents would impose upon a person the obligation of filing a statement before he had performed his part of the contract; and is importing into the statute words which the Legislature has seen fit to omit. See *Miller v. Batchelder*, 117 Mass. 179; *Gale v. Blaikie*, 126 Mass. 274. Section 6 of the same chapter also provides that no inaccuracy in stating the amount due for labor and materials shall invalidate the proceedings, unless it appears that the person filing the certificate has wilfully and knowingly claimed more than is his due, thus recognizing that a statement may contain items for which a lien cannot be enforced.

SOULE, J. The Gen. Sts. c. 150, give to any person to whom a debt is due for materials furnished and actually used in the erection, alteration or repair of a building on real estate, by virtue of an agreement with or by consent of the owner, a lien on the building and on the interest of the owner thereof in the

lot of land on which it is situated, to secure the payment of the debt so due. § 1. But such lien is dissolved and lost, unless the person desiring to avail himself of it files in the office of the clerk of the city or town a statement of a just and true account of the amount due him, within thirty days after he ceases to furnish materials for the building. § 5.

It is clear that the statement of account is intended to embrace only those charges which the lien secures, and that it is to be filed within thirty days after the last of the items charged and secured is furnished. The only "materials" which are the subject matter of provisions of the statute are materials furnished and actually used. While the statute, in § 6, provides that no inaccuracy in stating the amount due shall invalidate the proceedings, unless it appears that the person filing the certificate has wilfully and knowingly claimed more than is his due, it is nowhere provided that a lien may be saved by inserting in the statement a charge actually due, but for which there is no security by lien under the statute, if that charge covers all the articles furnished within thirty days before the filing of the certificate. The lien is not a common-law right, but a creature of the statute. It can be preserved and enforced only by a strict compliance with the requirements of the statute. There are no equities to be invoked in aid of it. The petitioners furnished no materials within thirty days before filing their certificate, which were actually used in the erection of the building. The articles which they furnished to Blaikie within that time were not delivered on the lot of land on which the building was situated, and were attached for Blaikie's debt without going upon that lot. The petitioners, therefore, had no lien to secure payment for them, and their certificate was not filed within the time required by the statute. The refusal so to rule was erroneous.

Petition dismissed.

ELLEN L. WOODWARD vs. JOHN K. SARTWELL.

Middlesex. Jan. 13, 1879. — July 10, 1880. COLT & SOULE, JJ., absent.

A. conveyed a parcel of land to B., and B., as part of the same transaction, reconveyed the land to A. The first deed was at once recorded, but the second deed was not recorded until some months afterwards, it being the intention of the parties that it should not be recorded, in order that the record title should be in B. *Held*, that a creditor of B., without notice of the unrecorded deed, could attach the land as his property.

Under the St. of 1874, c. 188, the right, title and interest of a debtor in land may be sold on execution, and such sale will pass such estate as the debtor had at the time of the attachment.

At the time of an attachment of the right, title and interest of A. in land, the record title stood in his name, but he had previously conveyed the land by deed, which was recorded after the attachment and before the levy on execution. The attaching creditor had no knowledge of the deed until it was recorded. The right, title and interest in the land, which A. had at the time of the attachment, was sold on execution, under the St. of 1874, c. 188, and the deed of the officer described the land conveyed in the same manner. *Held*, that the purchaser took a good title to the land as against A.'s grantee.

It is no objection to the sale of land on execution, that it is made at the office of the officer making the sale, which office is in his dwelling-house.

WRIT OF ENTRY, dated November 16, 1877, to recover a parcel of land in Watertown. Plea, *nul disseisin*. Trial in the Superior Court, before Allen, J., by whose direction the jury returned a verdict for the tenant; and the demandant alleged exceptions. The facts appear in the opinion.

J. S. Abbott, for the demandant.

D. F. Fitz & J. H. Sherburne, for the tenant.

ENDICOTT, J. The demandant, being in possession of this estate in her own right, conveyed the same, her husband joining, by quitclaim deed, to one Burnham, and Burnham conveyed to W. L. Egerton, who reconveyed to the demandant. The first two deeds were dated, acknowledged, and recorded on June 13, 1876; the last deed was also dated, acknowledged, and delivered to the demandant on that day, but was not recorded until June 14, 1877. Neither Burnham nor W. L. Egerton paid any consideration, or was ever in actual possession of the premises. The jury have found that the deed from W. L. Egerton to the demandant was not delivered to her with the other deeds for the purpose of being recorded with them, nor with the intention of

passing the record title forthwith to her; and also that it was the intention of the demandant that this deed should not be recorded, and that the record title of the land should be placed in W. L. Egerton.

While the record title thus stood in W. L. Egerton, his right, title and interest in the land were, on November 27, 1876, attached on the writ of J. O. Egerton, and, judgment having been obtained in the action, on July 3, 1877, soon after the deed of W. L. Egerton to the demandant was recorded, the right, title, and interest of W. L. Egerton in the same were sold on execution under the St. of 1874, c. 188, to J. O. Egerton, from whom the tenant derives his title. Neither J. O. Egerton nor the tenant had any actual knowledge of the deed from W. L. Egerton to the demandant till the trial of this cause.

The first question is, Did W. L. Egerton have any right, title or interest which could be attached while the estate stood in his name upon the record, although he had parted with his interest by a deed given to the demandant, which was not intended by the parties to be recorded, and was designedly withheld from the records?

It is settled in this Commonwealth, that where a person to whom land is conveyed by deed immediately conveys the land to another, so that the deeds are parts of the same transaction, and the seisin is instantaneous and only for the purpose of conveyance, his wife can have no dower in the land, and it is not the subject of an attachment by his creditors. *Holbrook v. Finney*, 4 Mass. 566. *Chickering v. Lovejoy*, 13 Mass. 51. *Clark v. Munroe*, 14 Mass. 351. *Haynes v. Jones*, 5 Met. 292. See also *Burns v. Thayer*, 101 Mass. 426; *Borden v. Sackett*, 113 Mass. 214. The fact that the deeds were executed on the same day, though strong, is not conclusive, evidence that the seisin was instantaneous; that may be a question for the jury to decide on all the facts and circumstances of the case. *Webster v. Campbell*, 1 Allen, 313. *Hazleton v. Lesure*, 9 Allen, 24.

In this case that inference is rebutted by the finding of the jury, that, while all the deeds were executed, acknowledged and delivered at the same time, and were parts of one transaction, the last was withheld from the record by the demandant in order that the record title should stand in the name of W. L. Egerton.

It seems to have been the object of the conveyance to place the record title merely in Egerton, without giving him any real interest in the estate as against the demandant. If none of the deeds had been recorded, the case would have fallen precisely within the case of *Haynes v. Jones, ubi supra*; but the difficulty arises from the fact, that, while the deed to W. L. Egerton was recorded, the deed from him was not. The seisin he acquired was really instantaneous; but the record did not disclose, and it was not intended that it should disclose, that fact to a purchaser or an attaching creditor, and this seems to have been the object of the transaction. Great stress is laid in *Haynes v. Jones* on the fact that McIntire, through whom the title passed, was not in possession of the estate, and had no title by a recorded deed; and it was held to be sufficient to defeat the attachment that he had conveyed whatever title he had by deed also unrecorded.

As the demandant allowed, and it was the intention of the parties that she should allow, for some purpose, the record title to stand thus for a long time, we are of opinion that the land was liable to attachment as the property of W. L. Egerton by a *bona fide* creditor without notice. Had Egerton sold to a third party without notice, the deed, when recorded, would have been good against the prior unrecorded deed of the demandant. *Norcross v. Widgery*, 2 Mass. 506. *Flynt v. Arnold*, 2 Met. 619.

An attaching creditor stands in the position of a purchaser for value, and, as a deed duly recorded takes precedence of a prior deed unrecorded, so an attachment, when duly made, has the effect of a prior purchase and takes precedence of a prior unrecorded deed. *Marshall v. Fisk*, 6 Mass. 24. *M'Mechan v. Grif- fing*, 9 Pick. 537. *Roberts v. Bourne*, 23 Maine, 165. It is true that, as between W. L. Egerton and the demandant, the title to the land was in the demandant; but, as the deed may affect the rights of purchasers or attaching creditors, as to them it is necessary that there should be actual notice or constructive notice by registry. *Earle v. Fiske*, 103 Mass. 491. *Fiske v. Chamberlin*, 103 Mass. 495. The demandant, therefore, by recording her deed in June 1877, a few days before the judgment was rendered against W. L. Egerton, in the action in which the attachment was made, gained no rights as against J. O. Egerton,

the attaching creditor. The recording of her deed operated as a conveyance of the estate subject to the attachment made on November 27, 1876, and disclosed the fact that W. L. Egerton had parted with his interest in the land to the demandant before the attachment was made; but, as the title stood in his name on the record, he still had an attachable interest therein to the same extent as if he had made no conveyance to the demandant. Judgment having been obtained, execution could be levied on the land under the Gen. Sts. c. 103, by levy and set-off, or, at the election of the judgment creditor, by sale under the St. of 1874, c. 188; and, having elected to have it levied by sale, the purchaser at the sale would take such title as could pass by the sale, if the sale was regular and all proper forms were complied with. The demandant denies that the sale was regular; and it becomes necessary to consider the statutes under which it was made, and the form of the conveyance under which the tenant claims title.

It is provided in the Gen. Sts. c. 103, §§ 1-8, that all lands of a debtor in possession, remainder or reversion, and all rights of entry into such lands, and of redeeming mortgaged lands, may be taken on execution, and, having been duly appraised, may be set off to the execution creditor by metes and bounds with as much precision as is necessary in a common conveyance, and that "all the freehold estate and interest which the debtor has in the premises shall be taken and pass by the levy." § 8. When the right of redeeming mortgaged lands is seized on execution under these sections, the land itself must be set off by metes and bounds; and other provisions in regard to the action of the appraisers and the redemption from the levy are contained in §§ 33-38. But §§ 39, 40, provide that the right of redeeming mortgaged lands may, at the election of the creditor, be sold on execution by the officer, at auction, and he shall execute a sufficient deed thereof to the purchaser, which, being recorded, shall give to the purchaser all the debtor's right of redemption. But the officer must sell the entire estate which is at the time of the beginning of the levy bound by the lien of the attachment. It is clearly the intention of the Gen. Sts. c. 103, that the levy of an execution, by a sale and conveyance thus made, of the right which the debtor has in premises subject to

a mortgage, shall have the effect to pass all the freehold estate and interest of the debtor therein, as fully and effectually as if the land were set off by metes and bounds to the creditor. The creditor has his choice, and by either method he can secure the fruits of his attachment.

By the St. of 1874, c. 188, the right thus to sell is extended to any creditor where land is taken to satisfy his execution; and it may be sold "in like manner as the right to redeem mortgaged land is now sold; the officer who serves the execution shall proceed in all respects in the manner prescribed for the sale of such right of redemption." A sale, therefore, may be made, and the estate or interest of the debtor may be conveyed by deed. *Hackett v. Buck*, 128 Mass. 369. The land itself may be conveyed, or the right, title and interest of the debtor in the same may be conveyed, and if the latter form of deed is used by the officer, such estate as the debtor had in the premises at the time of the attachment would pass. And if at the time of such conveyance it appears that there was a deed, prior to the attachment, but not recorded till after the attachment and before the conveyance by the officer, in such case we are of opinion that a deed by the officer of the right, title and interest of the debtor at the time of the attachment conveys the interest which he then had. For the deed which conveys in terms the interest which was attached, is equivalent to a conveyance made by the debtor at the time the attachment was made; and in the case at bar, as the record title then stood in the name of the debtor, as to *bona fide* purchasers, he was the owner of the land. *Hall v. Crocker*, 3 Met. 245. *Capen v. Doty*, 13 Allen, 262. *Earle v. Fiske*, *ubi supra*.

The attachment by the officer, in the case at bar, of all the right, title and interest of W. L. Egerton in the estate, was a valid attachment. *Taylor v. Mixer*, 11 Pick. 341. *Pratt v. Wheeler*, 6 Gray, 520. By virtue of his execution, he seized that which he attached, that is, the right, title and interest of W. L. Egerton in the premises on the day of the attachment. He gave the notices of the time and place of the sale, and published the advertisement as required by law, duly adjourned the sale from time to time, and finally sold the debtor's right, title and interest in the premises, on the day of the attachment, to

the highest bidder. The presiding judge was not bound to give to the jury the third instruction requested.* No evidence relating thereto was introduced by the demandant. It does not appear from the officer's return that the time appointed was improper, or that there was not a fair attendance of purchasers at the time of the sale. It is not necessary that the place of sale should be a public place. Gen. Sta. c. 103, § 40. The deed to the purchaser recites the attachment, the seizure, the notices, and the sale, and conveys "the right, title and interest which the said Wales L. Egerton had at the time when the same was attached as aforesaid in and to the following described real estate."

We are of opinion, that this was a sufficient deed of the premises. It was sufficient to describe what was to be sold, the right, title and interest of W. L. Egerton on the day of the attachment, and the deed of the same conveyed that which was attached. A quitclaim deed conveys the land described in it, if the grantor owns the land, and, although Egerton had parted with his interest, the record title remained in him, and as to third persons it was as if he had not conveyed it by deed unrecorded. It is the interest as it appears from the records which is attachable.

We are also of opinion, under our decisions previously cited, that a conveyance of the right, title and interest by the apparent owner on the record, or an attachment of his right, title and interest afterwards, followed by a levy and conveyance under the St. of 1874, c. 188, of the right and interest so attached, carries with it the apparent title of record, which the vendor or debtor has, even when there is a prior deed of the land unrecorded, for,

* This request was as follows: "That if the jury should be satisfied from the evidence that the time when the sale described in the deed of John M. Fisk [the officer] to Egerton was made, and that the time appointed in the published notice of sale was at an unusual and unreasonable hour for a public sale, and that the place was a private and not a public place, and that neither the time nor place of sale was such as to give a reasonable expectation of a fair or ordinary attendance of purchasers or bidders, and that there was not in fact a fair or ordinary attendance of purchasers or bidders, the sale then made would be invalid." The officer's deed stated that the sale was made at his office in his dwelling-house at Newton, at eight o'clock in the morning.

as to attaching creditors and *bona fide* purchasers, he is the owner. *Earle v. Fiske*, *ubi supra*. The demandant cites many cases to sustain the proposition, that, as the deed of the officer conveys only the right, title and interest of W. L. Egerton in the land, and Egerton had parted with his title, such deed conveys no title whatever.

In *Adams v. Cuddy*, 13 Pick. 460, where the owner of a tract of land in Boston conveyed a portion of it, describing it by metes and bounds, and subsequently executed another deed conveying all the right and title to "the land I have in Boston" to a second grantee, and containing no other description, which deed was recorded before the prior deed, it was held that the portion of land which was described in the prior deed did not pass to the second grantee, as coming within the general description of the estate conveyed in the subsequent deed. This conclusion was reached by the construction which the court gave to the two deeds. It was contended that the second deed did not include the land conveyed by the prior unrecorded deed, and also that the grantee in the second deed had notice of the prior conveyance. The court decided both these questions against the defendant, who held under the second grantee. It is said in the opinion, that the deed is illiterate and informal; that it contains no covenants of any kind, or any specific description of any land; and that, where a grantee takes by so indefinite a description as to the right which the grantor has, he must take the risk of his grantor's right, and where the grantor had legally parted with a particular estate in Boston, that estate did not come within the general description of the estate granted to the second grantee. And the court remarked, "Were it construed otherwise, the grantors might in effect commit a fraud, without intending or even being conscious of it."

But in the case at bar there is in the officer's deed a specific description of the premises, and the officer is not required to make any covenants, except that he has complied with the rules of law in relation to the sale.

Nothing decided in *Blanchard v. Brooks*, 12 Pick. 47, *Comstock v. Smith*, 13 Pick. 116, or *Wight v. Shaw*, 5 Cush. 56, has any material bearing on the question in controversy here, and we are not aware of any case in our own reports, where a deed of

this description has been held to be invalid against a prior unrecorded deed of the same land.

In *Brown v. Jackson*, 3 Wheat. 449, Henry Lee, the devisee under the will of Alexander Skinner conveyed the tract of land in controversy specifically by metes and bounds to Henry Cragg, describing himself as devisee of Skinner, and the plaintiff in error claimed title under Cragg. This deed was not recorded until after a subsequent deed from Henry Lee to Henry Banks, under whom the defendant in error claimed title. This deed to Banks granted "all the right, title and claim which he the said Alexander Skinner had, and all the right, title and interest which the said Lee holds, as legatee and representative of the said Alexander Skinner, deceased, of all land lying and being within the State of Kentucky, which cannot at this time be particularly described, whether they be by deed, patent, mortgage, survey, location, contract, or otherwise;" with a covenant of warranty against all persons claiming under Lee, his heirs and assigns; but there was no covenant of warranty against those claiming under Skinner. Mr. Justice Todd, in delivering the judgment, stated the general proposition, that a conveyance of the right, title and interest in land, is certainly sufficient to pass the land itself, if the party conveying has an estate therein at the time of the conveyance, but it passes no estate which was not then possessed by the party. And he adds: "If the deed to Banks had stopped after the words 'all the right, title and claim which Alexander Skinner had,' there might be strong ground to contend that it embraced all the lands to which Alexander Skinner had any right, title or claim, at the time of his death, and thus have included the lands in controversy. But the court is of opinion, that those words are qualified by the succeeding clause, which limits the conveyance to the right, title and claim which Alexander Skinner had at the time of his decease, and which Lee also held at the time of his conveyance; and coupling both clauses together, the conveyance operated only upon lands, the right, title and interest of which was then in Lee, and which he derived from Skinner. This construction is, in the opinion of the court, a reasonable one, founded on the intent of the parties, and corroborated by the terms of the covenant of warranty. Upon any other construction, the deed must

be deemed a fraud upon the prior purchaser; but in this way both deeds may well stand together, consistently with the innocence of all parties."

It is to be observed that this description is even more general than that in *Adams v. Cuddy*; and, as in that case, the conclusion of the court is reached by a construction of the instruments founded on the manifest intention of the parties, and corroborated by the terms of the covenant of warranty. But it is clearly and distinctly intimated by the court, that, if the deed to Banks had stopped after the words "all the right, title and claim which Alexander Skinner had," it might have included the lands in controversy, from which we are to infer that, as the title to the land was in Skinner at the time of his death, a deed from Lee of the right, title and interest which Alexander Skinner then had in the land would be good as against a prior unrecorded deed from Lee conveying the land by metes and bounds.

In *Coe v. Persons Unknown*, 43 Maine, 432, the petitioner for partition claimed to have four thousand acres in a township, held in common and undivided, set off to him in severalty. This township consisted of twenty-two thousand and eighty acres of land, and was originally owned by S. A. Bradley, who conveyed the four thousand acres in common and undivided to George Evans, by deed dated November 1836, and recorded January 1849, and Evans conveyed the same to the petitioner, by deed dated November 1850, and recorded December 1852. Robert Bradley appeared in defence, and set up a mortgage deed to himself and Richard Bradley from S. A. Bradley, of all his right, title and interest in and to said township, subject to a mortgage of the same to James Rundlet. This mortgage to Robert and Richard Bradley was dated after the deed to Evans, but recorded before, to wit, in June 1844. The mortgage to Rundlet of eighteen thousand acres was dated after the deed to Evans, but was recorded before Evans's deed, and was assigned to Robert Bradley in 1849. There was another mortgage by S. A. Bradley of land in this township to Mary Ann Bradley, who died in 1841, Robert Bradley being her sole heir at law; but this mortgage has no bearing on the case, as it was not recorded until 1854, after the deeds to Evans and the petitioner were recorded. It was contended that the mortgage deed to Bradley, being recorded before

the prior deed to Evans, took precedence of that prior deed. But again we have a case that turns upon the construction of a deed, which obviously by its terms was not intended to include, and did not include, the land embraced in the prior unrecorded deed to Evans. The township contained twenty-two thousand and eighty acres, and the owner, having conveyed four thousand acres to Evans in common and undivided, mortgages eighteen thousand of the same in common and undivided to Rundlet. He then gives to Bradley a mortgage of all the right, title and interest which he has in the township, "subject to a mortgage of the same" to Rundlet. The extent of the right, title and interest conveyed is defined by the deed itself, as that which he has in the eighteen thousand acres mortgaged to Rundlet, and no more. Rundlet had no mortgage of the township, but only of eighteen thousand acres of the same, and Bradley takes only the right of redemption in this eighteen thousand acres, and the deed does not include the four thousand acres previously conveyed to Evans. The court so decided, and the reasoning of the court is unanswerable. The court also puts the case on the ground, that, when a grantee takes by so indefinite a description as the right, title and interest which the grantor has, he must take the risk of the grantor's right, title and interest, and the covenants in the deed are qualified and limited, and cannot be enlarged by the grant, and therefore, whether the deed to Evans was registered or not, as Bradley had parted with his title to him, the title to the land so conveyed did not come within the general description of the estate conveyed to Bradley. This certainly was not necessary to the decision.

The facts and the deed differ materially from the facts and deed before us; and we do not regard the case as authority upon which we can decide that a deed by a person in whose name the record title stands, conveying all his right, title and interest in a specific parcel of land, duly recorded, is invalid by reason of a prior unrecorded deed conveying the land itself, of which the purchaser had no notice; and we do not find that any of the cases cited by the court on that point so decide. Having a record title, there is something which he can convey to a *bona fide* purchaser, or which can be attached by a creditor, ignorant of the prior unrecorded deed.

Exceptions overruled.

ELIAS CRAFTS & another, trustees, vs. SARAH A. HUNNEWELL.

Norfolk. January 27. — July 2, 1880.

A testator devised his estate to trustees, in trust to pay the income of \$4000 to his son for life; to his son's wife for life, if she should survive him; and, on their death, the income and principal to go with the residue of his estate. The will also contained many provisions for the income of different portions of his estate, and included in the remainder "the income of any of the foregoing principal sums that may lapse thereinto." By a codicil, which recited that he had given his son the income of \$4000 for life, he declared that he altered the legacy by adding to the same the income of \$2000 additional "to be paid in the same way and manner." By a subsequent codicil he directed his trustees to pay the income of \$4000, in addition to the income of \$6000, to his son, "so that he shall have the income of \$10,000 during his life; the principal sum on his decease to lapse into the residue of my estate." *Held*, that the bequest to the wife of his son was revoked by this codicil.

PETITION to the Probate Court by the trustees under the will of Joseph Hunnewell for instructions on the question whether a provision in the will in favor of Sarah A. Hunnewell for her life was revoked by the third codicil of the will. The judge of probate ordered a decree to be entered that it was so revoked; and Sarah A. Hunnewell appealed to this court. Hearing before *Morton, J.*, who reserved the case for the consideration of the full court. The material provisions of the will and codicils appear in the opinion.

O. B. Mowry, for the appellant.

J. H. Tyler, for the residuary legatees.

LORD, J. Joseph Hunnewell gave his entire estate, with trifling exceptions, to trustees, who were to dispose of the income of it in a manner directed by the will; and by the seventh article of his will those trustees were required to pay to Edwin Hunnewell, his son, the income of four thousand dollars "as long as he shall live, and if his wife Sarah should survive him, then to pay such income to her as long as she shall live." The will was dated December 22, 1870.

In November 1871, he made a codicil, by which he increased the bequest to his son Edwin, and, besides directing his trustees to pay him the income of four thousand dollars, directed them to pay the income of the additional sum of two thousand dollars, "to be paid in the same way and manner." If there were

nothing further, it would be difficult to hold that the provision of the will in favor of Sarah, the wife of Edwin, was revoked by this codicil. By the eighth clause of his will, he directs the trustees to pay the income of four thousand dollars a year to his son George Hunnewell so long as he may live; and, although it was not necessary to state the fact, he had evidently increased his bounty to George by the addition of the income of two thousand dollars, as he had to Edwin.

In October 1873, he made a third codicil to his will, containing this provision: "And, secondly, I direct my trustees to pay the income of four thousand dollars, in addition to the income of six thousand dollars hereinbefore mentioned in my will and codicil, to each of my sons, Edwin and George, so that they shall have each of them the income of ten thousand dollars during their life; the principal sum on their decease to lapse into the residue of my estate. In all other respects I ratify and confirm my said will and codicils."

A majority of the court are of opinion that this clause of the codicil revokes the gift to the wife of Edwin. The testator, by the words "principal sum," could have meant no other sum than the ten thousand dollars, the income of which was payable to Edwin during his life; and having provided that, upon the death of Edwin, that principal sum should be devoted to another and different use, he could not have intended that the income of it, or of any part of it, should be devoted to the benefit of his son's wife. The testator in his will makes many provisions for the income of certain portions of his estate, for longer or shorter periods, and then provides that the income of all the rest is to be held for a certain purpose for the term of twenty years; but he takes care to include in the remainder of his estate "the income of any of the foregoing principal sums that may lapse thereinto." Whether by oversight or by design, the testator, by limiting the payment of the income to Edwin's lifetime, and by devoting the principal to another purpose at his death, has so clearly revoked the bequest in favor of Edwin's wife, that to attempt by construction to continue his bounty to her would be rather the exercise of testamentary than of judicial authority.

Decree of Probate Court affirmed.

JOHN J. C. SMITH & another vs. IRA L. MOORE & another.

Suffolk. March 8. — August 5, 1880. ENDICOTT & SOULE, JJ., absent.

The owners of letters patent of the United States for a certain invention formed an association for the purpose of introducing the invention in Europe and obtaining patents therefor; and executed a declaration of trust, which declared that they held the property for the use of the association; and provided that no member of the association should receive any money on behalf of the association, except as authorized by the declaration of trust; that an executive committee should have the general management and control of the business; and that all votes of the association, not inconsistent with the declaration of trust, should be binding upon the trustees, the association and the executive committee. On the day this was executed, an indenture (referred to in the declaration of trust) was made between the trustees and A., a member of the association, by which A. was to sell the invention in Europe and pay over the proceeds to the trustees. No sale having been made under this indenture, the executive committee authorized one of the trustees to go to Europe and sell the letters patent for not less than a certain sum. After he had left this country in pursuance of this authority, the association, at a meeting at which the other trustee was present and acting, passed a vote authorizing the absent trustee to sell the letters patent for such sum as he should deem best, and directing the proceeds to be deposited in a bank in England to the credit of A. for the use of the shareholders. The executive committee passed a similar vote. The absent trustee, acting under these votes, made a sale in England of the letters patent, and the money therefor was paid to A. in this country by the agent of the purchaser. On the return of the trustee to this country, he demanded the money of A., who refused to pay it. This trustee subsequently made a contract with A., by the terms of which certain sums were to be paid by A. out of this money, and the balance distributed among the shareholders. *Held*, in an action for money had and received, by the trustees against A., to recover the proceeds of the sale, that, even if the votes of the association were inconsistent with the declaration of trust, the trustees had waived their right to take this objection; and that the action could not be maintained.

MORTON, J. This is an action of contract for money had and received, brought by John J. C. Smith and Jesse A. Locke against Ira L. Moore and Gustavus D. Dows.

It is admitted that the defendants received the amount claimed; and the question is whether they received it for the use of the plaintiffs. The facts, as stated in the bill of exceptions, are complicated, but those which we deem material to the decision of the case are as follows:

In 1869, the plaintiff Smith and his brother, Michael Smith, held certain letters patent for the United States "for improvements in casting metals under pressure." Michael assigned to

the plaintiff Locke his right and interest in the inventions so far as European countries were concerned. The two plaintiffs, thus having control of the inventions for the countries of Europe, formed an association called "The American Compression Casting Association" for the purpose of introducing the inventions in Europe and obtaining patents therefor. The plan of the parties was that the legal title to the patents should remain in the plaintiffs, as trustees, for the benefit of the shareholders in the association. They accordingly executed a "declaration of trust," which was the basis upon which the association was formed and was to be conducted. It provided, among other things, that the trustees should hold the property for the use of the association, should divide among the shareholders the profits of the business when directed by the executive committee, that no member of the association should have any right to make any bargains or receive any money on behalf of the association except as authorized by the declaration of trust, that there should be an executive committee who should have the general management and control of the business, and that all votes of the association not inconsistent with the declaration of trust should be binding upon the trustees, the association and the executive committee. On the same day, an indenture, which is recognized in the declaration of trust, was made between the plaintiffs and the defendants, the general purpose of which was that the defendants should proceed to introduce the inventions into England and other European countries, and obtain letters patent and sell rights and licenses, accounting for and paying over to the trustees all money received by them, with certain specified deductions. These two papers were dated May 13, 1869.

The defendants did not succeed in making any sales under this indenture, and at a meeting of the executive committee, held May 20, 1872, the plaintiff Smith was authorized to go to Europe and sell the patents for not less than £9000.

A meeting of the association was held on July 25, 1872, at which it was voted that said Smith, who was then in England, be authorized to sell the patents and property of the association in and for the territory of Europe for such sum as in his discretion he may think best for the interest of all concerned; "the

papers and deeds executing said sale to be delivered by, and the proceeds and money for such sale to be paid to, Adolphus Clark, 1 Chandos Street, Charing Cross, London, England, to be deposited in the London and County Bank, London, England, to the credit of Ira L. Moore and Gustavus D. Dows aforesaid, for the use of said shareholders; with liberty to said Moore and Dows to transmit the same to said shareholders; and that said executive committee be authorized to give said power to said Smith, and forthwith transmit to him and said Clark a copy of this vote." On the same day, the executive committee passed substantially the same vote, and they transmitted a copy of the proceedings to Smith.

On September 7, 1872, the said Smith, then in England, made a sale of the English letters patent to one Mackintire for eight hundred pounds sterling, payable May 1, 1873. By a subsequent agreement, the time of payment was extended to January 1, 1874. On that day, an agent of Mackintire in Boston went to the defendants, and, upon their representations that they were authorized to receive it, paid to them the said sum of eight hundred pounds, and the defendants entered into an obligation to do whatever was necessary to complete and make effectual the transfer to Mackintire. Said Smith was then in England; upon his return, he demanded the money of the defendants, who refused to pay it. Subsequently, on October 15, 1874, the said Smith entered into a contract with the defendants, in which, after reciting that "Ira L. Moore and G. D. Dows have in their hands eight hundred pounds sterling, paid them by the agent of James Mackintire for the assignment to him of certain English patents, which sum said Moore and Dows hold for certain parties interested," and that, in order to complete the said assignment, it was necessary to pay certain sums in England, he authorizes said Dows to pay the same and authorizes "the said Moore and Dows to deduct from my shares of said eight hundred pounds all sums so paid;" and the said Dows agrees to make such payments, "and immediately to give notice thereof by mail to said Moore, who shall proceed to distribute forthwith said eight hundred pounds among the parties interested, paying first the bills of the association, and deducting from said J. J. C. Smith's share the amount as above provided."

There are other facts stated in the bill of exceptions, which may be of importance in finally adjusting the rights of all parties, but the above are all the facts material in the decision of this case.

Upon these facts, we are of opinion that the court should have ruled, as requested by the defendants, that the plaintiffs could not recover.

In the votes of July 25, 1872, it was the purpose of the association and of the executive committee that the money for which Smith might sell the English patents should be paid into the hands of the defendants, to be by them distributed among the shareholders. It was expected that the money would be paid in England, and therefore the mode in which it was to be placed to the credit of the defendants was specified. But this is merely incidental, the substantial thing being that they were to receive the money for the association and shareholders. When, therefore, the agent of Mackintire offered to pay the eight hundred pounds in Boston, the defendants were the proper persons to receive it; and when it was paid to them, they received it, not for the use of the plaintiffs, but for the use of the association and its members. The defendants were under no obligation to, and could not rightly, pay it over to the plaintiffs.

It is contended that those votes are void, because inconsistent with the declaration of trust. But, if they were inconsistent, it was competent for the parties by mutual consent to waive the provisions of the declaration of trust. One of the trustees was present and acting at both the meetings which passed the votes. The other, Smith, was in England, but his accepting and acting under the votes, and his contract with the defendants of October 15, 1874, are conclusive evidence that he assented to them, and therefore he must be held to have waived his right to object that they were inconsistent with the declaration of trust.

We are therefore of opinion, that, upon the undisputed facts, the plaintiffs cannot maintain this action, but that their remedy is by a bill in equity, in which the rights of all the members of the association, which is a partnership, can be finally adjusted.

The plaintiffs argue that the finding of the presiding justice of the Superior Court, "that the defendants had no right to receive and hold the money as against the plaintiffs," is conclusive, being a finding of fact. But we do not understand this to have been a finding of a fact based upon evidence not reported to us, but a conclusion of law from the facts and evidence reported. We do not think this conclusion is justified by the evidence.

New trial ordered.

D. B. Gove, for the defendants.

E. W. Hutchins, for the plaintiffs.



JOHN W. MCKIM, Judge of Probate, vs. WILLIAM S. BARTLETT & others.

Suffolk. March 11. — Aug. 31, 1880. ENDICOTT & SOULE, JJ., absent.

If the estate of a deceased person is represented insolvent, and commissioners are appointed by the Probate Court to adjudicate upon the claims of creditors against the estate, and no appeal is taken from the decision of the commissioners upon the claims presented, the neglect of the administrator of the estate to render his account within six months after the return of the commissioners, if no further time is allowed him by the court, is a breach of his administration bond, under the Gen. Sta. c. 99, § 26; the return of the commissioners, without any appeal, is "the final liquidation of the demands of the creditors," within the meaning of the statute; and the fact that a creditor presents a contingent claim against the estate, upon which no action is taken, is immaterial.

If the sureties upon an administration bond are discharged by the Probate Court, and a new bond is given to and accepted by the court, with other sureties, and there is a breach of the bond before such discharge, caused by the failure of the administrator to render his account within the time required by law, the original sureties are not liable for the full value of the property in the hands of the administrator, if he has not misappropriated it before their discharge, but only for nominal damages, or such damages as are caused by his delay in filing an account; and if such property is lying idle and unproductive, there being no misappropriation, interest during the period of the administrator's delay to file his account is the measure of damages.

CONTRACT upon a bond signed by the defendant Bartlett as principal, and the other defendants as sureties, and conditioned for the faithful performance by Bartlett of his duties as administrator of the estate of Hillman B. Barnes. The case was

submitted to the judgment of this court upon an agreed statement of facts, in substance as follows :

On September 14, 1874, administration of the estate of Barnes was granted to the defendant Bartlett, who accepted the trust and gave the bond in suit. On December 22, 1874, Bartlett made and returned into court an inventory of the estate; the real estate being appraised therein at \$86,700, and the personal estate at \$31,364.25. On September 10, 1875, he filed his first account as administrator, which was allowed by the court on September 27, 1875; and which stated a balance of \$5437.57 of the personal estate to remain in his hands as administrator. On February 28, 1876, he filed a representation that the estate was insolvent. The Probate Court thereupon appointed two commissioners to receive and examine all claims of creditors against the estate, and to return into court a list of all claims laid before them, with the sum allowed on each.

On May 18, 1876, Bartlett, as administrator, sold all the real estate of the deceased, by virtue of a license granted to him by the court, and received therefor the sum of \$17,500. On September 1, 1876, John G. White filed in the Probate Court a petition alleging that he had a contingent claim against the estate, not determinable until October 1, 1877, and praying that the assets of the estate might be reserved to secure the same; upon which petition no hearing has ever been had or any decree or order made. The commissioners received and examined all claims presented to them, and, on November 3, 1876, returned into court a list of all such claims with the sum allowed on each claim, the aggregate amount allowed being \$98,013.37. White filed with the commissioners a petition similar to that filed by him in the Probate Court, which petition the commissioners filed in court with their report and certified that the same was filed without action. No appeal was taken from the decision of the commissioners allowing or disallowing any claim presented. Bartlett did not render and settle any account of his administration in court, within six months after the return of the commissioners; and no further time was allowed him by the court within which to render his account.

On March 27, 1877, the defendant sureties filed in the Probate Court a petition, praying to be discharged from all further

responsibility on said bond, which petition, after due notice to all persons interested, was granted on May 14, 1877, and Bartlett was ordered to file a new bond, with sureties, which he did on May 28, 1877, and the same was approved.

On September 14, 1877, Bartlett was cited by the Probate Court to render an account of his administration of said estate, which he refused and neglected to do; and he has never rendered any such account, other than the account previously mentioned.

The Probate Court has never made any decree for the distribution of the effects of said estate among the creditors thereof, and, on April 29, 1878, authorized Benjamin Barnes, a creditor of the estate, whose claim was allowed by the commissioners, to bring this action, which was commenced on August 23, 1878.

Bartlett, on his own request, was allowed by the Probate Court to resign his trust, on July 8, 1878, and died after the bringing of this action.

If, upon these facts, the plaintiff could not maintain his action, judgment was to be entered for the defendants. If the plaintiff was entitled to nominal damages, judgment was to be entered accordingly. If the plaintiff was entitled to recover interest on the amount in the administrator's hands, from May 3 to May 28, 1877, judgment was to be entered for the plaintiff, and execution issue for such interest computed on \$22,937.57, with interest thereon to the date of the writ, and costs. If the plaintiff was entitled to recover other and substantial damages, the case was to be sent to an assessor to determine the sum for which execution should issue.

H. W. Paine & E. T. Luce, for the plaintiff.

O. W. Holmes, Jr. & W. A. Munroe, for the sureties.

MORTON, J. Upon the facts agreed in this case, there was a breach of the condition of the bond in suit, for which the plaintiff is entitled to recover at least nominal damages. In the case of an insolvent estate, the statute provides that, "if an executor or administrator neglects to render and settle his accounts in the Probate Court within six months after the return made by the commissioners or the final liquidation of the demands of the creditors, or within such further time as the court shall allow, and

thereby delays a decree of distribution, such neglect shall be deemed unfaithful administration; and he may be forthwith removed, and shall be liable in a suit on his bond for all damages occasioned by his default." Gen. Sts. c. 99, § 26. In this case, the return of the commissioners was made on November 3, 1876. There was no appeal from the decision of the commissioners allowing or disallowing the claims of the creditors, and the neglect of the administrator to render an account on or before May 3, 1877, was maladministration and a breach of his bond. The clause in the statute, "or the final liquidation of the demands of the creditors," was intended to apply to cases where there is an appeal from the decision of the commissioners, and where therefore the amounts due to creditors among whom a dividend is to be made cannot be ascertained until such appeals are determined. It was not intended to postpone the duty of the executor or administrator to render his account until contingent claims were finally determined. The return of the commissioners, without any appeal, was "the final liquidation of the demands of the creditors," within the meaning of the statute; and the fact that one White had presented a contingent claim is not material.

The remaining question is as to the amount of the damages the plaintiff is entitled to recover. It is admitted that, on May 28, 1877, the defendants, who signed the bond as sureties, were, by a decree of the Probate Court, discharged from further liability upon the bond in suit, a new bond with other sureties having then been given by the administrator and approved by the court. They thereupon ceased to be liable for any future acts of maladministration of the principal, but they remained liable for all breaches of the condition committed before the new bond was approved. Gen. Sts. c. 101, § 18. The plaintiff contends that they are liable for the full value of the property in the hands of the administrator. His argument is that, at any moment after his default, a suit might have been brought on the bond in which the measure of damages would be, under the Gen. Sts. c. 101, § 28, *cl.* 4, the value of the property; that this liability existed against the defendants after May 3, and they were not relieved from it by their subsequent discharge from responsibility on the bond. The measure of damages established by that

statute for a breach of the bond in not accounting is "the full value of all the estate of the deceased that has come to the hands of the executor, and for which he shall not satisfactorily account." *Choate v. Arrington*, 116 Mass. 552.

But if such suit had been brought against the defendants, we do not think that the measure of damages would necessarily have been the value of the property. If it appeared that there had been in fact no defalcation or misappropriation of the property by the administrator, but his only default was a delay in filing his account, he could, by filing his account and putting the property in his hands at the disposition of the judge of probate, exempt his sureties from any liability except for nominal damages, or for such damages, if any, as were caused by his delay in filing an account. This would seem to be clear if a suit had in fact been brought against the defendants while they remained liable as sureties, and they had caused the administrator to file his account. Do the facts, that a suit was not brought, and that the administrator did not file any account, extend their liability so as to make them responsible for the full value of the property? It is unjust that the sureties on the first bond should be held liable for misappropriations of the property by the administrator after they have been duly discharged. For such misappropriations the sureties on the second bond are liable. In such case the real damage to the estate is caused by maladministration after the first sureties are discharged, and is not the consequence of the breach for which they are responsible, viz. the delay to file an account. They ought not to be held responsible for a loss to the estate caused by subsequent maladministration, and not by the delay in accounting.

The plaintiff relies upon the case of *Choate v. Arrington, ubi supra*. In that case, there were two bonds, on one of which a surety had been discharged, but the suit was against the sureties on the second bond; and it was held that they were liable for all the estate which the executor ought to account for, whether received by him before or after the new bond was given; but it does not touch the question as to the liability of the surety who had been discharged.

In the case at bar, it does not appear that there had been any misappropriation by the administrator before the discharge of the

sureties. We are not quite clear whether we can take it as a fact agreed, that there had not been any such misappropriation, as the statement of facts is in this respect ambiguous. If there had not been any, we are of opinion that the defendants are not liable for the full value of the estate, but only for such damages as were occasioned by the delay in rendering an account. If there had been a previous misappropriation, this was maladministration for which the defendants would be liable under their bond. Unless the parties agree upon this matter, the case must be referred to an assessor.

If the defendants are not liable for any portion of the property received by the administrator, the further question whether they are liable for any other than nominal damages cannot be decided, because the statement of facts does not furnish us with the means of deciding it. If the money in the hands of the administrator was lying idle and unproductive, interest thereon would be a fair measure of the damages; but if the money was invested, earning income or interest, this income or interest would enure to the benefit of the creditors, and the plaintiff would not be entitled to any except nominal damages. This matter can be determined by the assessor. *Case to go to an assessor*

NORMAN STOCKWELL vs. HENRY COUILLARD.

Franklin. Jan. 7. — Sept. 13, 1880. COLT & LORD, JJ., absent.

The owner of a parcel of land granted by deed, duly recorded, to A. a part of the land, and a right to maintain a dam on the rest; and afterwards conveyed to a third person the whole parcel, "reserving" all the rights of A., his heirs and assigns, therein. *Held*, that this created an exception and not a reservation; and that the second grantee could not maintain an action against his grantor on the covenant of seisin in his deed.

CONTRACT for breach of the covenant of seisin contained in a deed of land from the defendant to the plaintiff. Trial in the Superior Court, without a jury, before *Dewey, J.*, who found for the plaintiff; and reported the case for the determination of this court. The facts appear in the opinion.

J. A. Aiken, for the defendant.

S. T. Field, for the plaintiff.

ENDICOTT, J. The defendant in his deed to the plaintiff, dated in June 1873, describes a parcel of land by metes and bounds, about fourteen hundred feet in length, and in width about four hundred feet at the northern end and about one hundred feet at the southern end, lying between a highway and the Deerfield River. Following the description is this clause, "reserving all the right A. Bowen, or his heirs or assigns, may have to fasten a dam across said river and to said premises, and all rights said Bowen has in the same." The construction to be given to this clause is the principal question presented in the argument.

The southern portion of this strip of land, not more than one hundred feet wide in any part, had been conveyed in 1860, by metes and bounds, to Alfred Bowen by Russell Stone, who then owned the farm of which the whole parcel forming the bank of the river was a part. This deed was duly recorded, and following the description of the land conveyed was this provision: "Together with the right of abutting a dam so far inland as to make the said dam safe and secure at all stages of water, but on condition, nevertheless, that any damage done to growing crops, by washing of the river, in consequence of the erection of such dam, or by passing over other land for the purpose of repairs to such dam, shall be paid for by the grantee and those claiming under him." Bowen thus took a title to the land specifically conveyed, and also acquired rights in the other part of the parcel fourteen hundred feet in length abutting on the river. He owned the premises, but had built no dam when the plaintiff took his deed.

In 1862, Stone made a deed of his farm to one Clemons, which included in the description the bank of the river; and in 1872 Clemons conveyed the same to the defendant, and the deed, which was duly recorded, referred to the interest of Bowen in the premises in these words: "also reserving whatever right A. Bowen or assigns may have to fasten a dam across said Deerfield River, and to said granted premises."

The deed of the defendant to the plaintiff clearly pointed out that Bowen, his heirs and assigns, had an interest in the land

conveyed; and a reference to the public records would have disclosed the character and extent of that interest. We are therefore of opinion, that the plaintiff took his deed subject to the rights of Bowen in the premises conveyed, which were thus excepted out of the grant.

The distinction between an exception and a reservation is well established; and it may be said, in general terms, that by a reservation a grantor reserves some new thing to himself, not in existence before, out of the granted premises, such as rent or an easement; by an exception some part of the thing granted is taken out of the premises conveyed, as where a certain parcel of land, or a building, or certain rights and privileges belonging to the grantor or to others, are excepted out of the general words and description of the grant. The words "reserving" and "excepting" are often used indiscriminately, and whether a particular provision is an exception or a reservation does not depend upon the use of the word "reserving" or "excepting," but upon the nature and effect of the provision itself. *Gale v. Coburn*, 18 Pick. 397, 400. *Hurd v. Curtis*, 7 Met. 94.

By the use of the word "reserving" in the defendant's deed, it is plain it was not intended to reserve anything to the defendant, for the rights of A. Bowen in the premises constitute the subject matter reserved, or, more properly speaking, excepted from the conveyance; and what these rights were was capable of being made certain by reference to the records, wherein the particular part of the premises conveyed to Bowen was described.

Every exception may be said to be inconsistent with the grant, but it is not void because inconsistent; it must be so inconsistent with the grant itself, that is, so repugnant to it, that the grant would be practically inoperative, and, as it cannot be presumed that this was the intention, the exception in such case must be treated as invalid. But the facts in this case bring it within the general rule, that where a parcel of land is conveyed in general, an exception of a particular lot, or of the rights of a person therein, is not repugnant, but is to be considered as valid. *Sprague v. Snow*, 4 Pick. 54. It has been repeatedly held that a conveyance of land, reserving or excepting the dower set off to a widow, was a good exception of her interest therein.

Caney v. Marcy, 13 Gray, 373. *Meserve v. Meserve*, 19 N. H. 240. *Crosby v. Montgomery*, 38 Vt. 238. *Swick v. Sears*, 1 Hill (N. Y.) 17. The interest set off to the widow is capable of being made certain. So an exception of land taken for a highway, or for a railroad, is a valid exception. *Richardson v. Palmer*, 38 N. H. 212. *Munn v. Worrall*, 53 N. Y. 44. And where a tract of land was granted, "except what I have heretofore conveyed to divers persons," it was held that it conveyed only the lands not previously granted. *Cornwell v. Thurston*, 59 Misso. 156. See also *Wooley v. Groton*, 2 Cush. 305; *Forbush v. Lombard*, 13 Met. 109; *Sawyer v. Coolidge*, 34 Vt. 303; *Moulton v. Trafton*, 64 Maine, 218; *Young, petitioner*, 11 R. I. 636; *Dolan v. Trelevan*, 31 Wis. 147; *Pettee v. Hawes*, 13 Pick. 323; *Cook v. Farington*, 10 Gray, 70.

As the deed to the plaintiff conveyed only such title as the grantor had in the land, excluding the interest of Bowen therein, the covenant of seisin was qualified and limited by the grant. *Allen v. Holton*, 20 Pick. 458. *Sweet v. Brown*, 12 Met. 175. The plaintiff, therefore, cannot maintain this action for the breach of that covenant. *Judgment for the defendant.*



**BOARDMAN P. BACKUS vs. MARK H. SPAULDING & another
executors.**

Hampshire. September 18, 1878; February 24. — September 21, 1880.

In an action against the executor of the maker of a promissory note, not negotiable, which had been assigned to a third person before maturity, for whose benefit the action was brought, it appeared that the defendant's testator had indorsed another promissory note for the accommodation of the nominal plaintiff, which note was due at the time the note in suit was given, but was not paid by the defendant until after notice to the testator of the assignment of the note in suit. *Held*, that the defendant could not, under the Gen. Sts. c. 130, set off this note, although the plaintiff in interest knew when he took the note in suit that the payee was insolvent. *Held* also, that these facts, together with the facts that the assignee of the note was warned by the defendant not to take the note, and that the nominal plaintiff was not called as a witness at the trial, would not warrant the jury in finding that the parties to the note in suit agreed that the amount which the testator might be called on to pay on the accommodation note should be in part payment of the note in suit.

COLT, J. This action is upon a promissory note, not negotiable, for \$3180, signed by Jonathan S. Baker, the defendants' testator. It is brought in the name of Backus, the payee, for the benefit of the firm of Stoddard & Kellogg, to whom it was assigned a few days before its maturity, and who gave notice of the assignment to the defendants soon after.

When this note was given, Baker was liable, as accommodation indorser, upon a note of Backus for \$2500, which was then overdue. After the assignment of the note in suit to the plaintiffs in interest, and notice of it to the defendants, and after it became due, but before this action was commenced, the \$2500 note was paid by the defendants as executors of Baker, and they now insist that the amount of the same shall be allowed in set-off in this action. They allege that, when the note in suit was given, it was agreed between Baker and Backus that the amount which the former should be obliged to pay on account of his liability as accommodation indorser for the latter should go to reduce the note in suit, by way of set-off. But the judge properly ruled that there was no evidence of this agreement which could be submitted to the jury. The evidence was that the negotiable quality of the note was destroyed by the erasure of the words "or order;" that Backus was insolvent, and known to be so by Stoddard & Kellogg at the time of the assignment to them; and that they were advised by the defendants before the assignment not to buy the note, because the estate of Baker had claims more than enough to meet it. But these facts are all consistent with the non-existence of the alleged agreement; and their weight as evidence is not increased by the consideration that Backus was not present at the trial, and did not give his deposition. The failure of a party to call a witness, who may be supposed to know of the fact in dispute, cannot be treated as affording positive evidence against him, or as adding to other evidence, unless the witness is within reach, and his testimony is needed to explain evidence already in. Backus does not appear to have been within reach, and there was nothing tending to show the existence of an agreement which the plaintiffs in interest were called on to explain. *Commonwealth v. Clark*, 14 Gray, 367.

A more important question is whether, independently of the alleged agreement between the parties, the set-off claimed can be

properly allowed. In dealing with that question, the note is to be treated as taken by Stoddard & Kellogg simply as assignees of a chose in action. The right of the defendants to apply in set-off the amount paid, after notice of the assignment, in discharge of the liability of Baker as accommodation indorser or surety for Backus, must be settled by the rules which govern in actions at law. The assignees of the note took it subject to all legal defences and all right of set-off existing at the time of its maturity between the parties to it. Their rights against the maker of the note are determined by the rights of the payee at that time.

The facts in the present case show that when Baker's note became due, after notice of the assignment, the defendants, as representatives of Baker's estate, had no debt against Backus, the payee, which could be availed of by way of set-off to diminish or extinguish the amount then due. An accommodation indorser or surety has no debt against the principal maker until he has paid the amount for which he is liable as surety or indorser. His liability is collateral, and his claim on the principal is contingent and uncertain, because it cannot be known that he will ever pay the debt, and until he does he suffers no injury. *Jenkins v. Brewster*, 14 Mass. 291. *Houghton v. Houghton*, 37 Maine, 72. *Houston v. Fellows*, 27 Vt. 634.

The statutes of this Commonwealth, relating to the set-off of mutual demands between plaintiff and defendant, declare that no demand shall be set off unless for the price of real or personal estate sold; or for money paid, or money had and received; or for service done; or unless it is for a sum that is liquidated, or that may be ascertained by calculation; or that existed at the commencement of the suit, and then belonged to the defendant; or unless it is due to him in his own right. They also provide that, if the demand on which the action is brought has been assigned, and the defendant had notice of the assignment, he shall not set off any demand that he acquires against the original creditor after such notice. Gen. Sts. c. 130, §§ 1-10.

In *Sargent v. Southgate*, 5 Pick. 312, it was decided, after much consideration, that, in an action by an indorsee against the maker of a negotiable note indorsed when overdue, and therefore

subject to the equities existing between the maker and payee, the defendant could not in his defence make use of a note made to him by the payee before the note in suit was assigned, unless he proved that the note was given as evidence of payment, or unless he filed it under the statute in set-off. It was said in reference to negotiable promissory notes when overdue, as distinguished from mere choses in action which require notice of their assignment, that this right of set-off must be confined to demands which accrued to the defendant while the payee was actual holder, and would not extend to demands which accrued afterwards, although no notice of the transfer of the note was given to the maker. And in *Baxter v. Little*, 6 Met. 7, it was decided that, where the first indorsee negotiated the note after maturity, in an action by the second indorsee, the defendant could not set off any claim which he had on the first indorsee, except such as existed at the time of the transfer of the note. See also *Ranger v. Cary*, 1 Met. 369, 375.

In *Jones v. Wolcott*, 15 Gray, 541, a surety who had signed a note for the purpose of raising money to satisfy a judgment recovered against him for the default of his principal, but who had not paid any money on account thereof, was held not entitled to set off the judgment against a debt due from him to the principal, or to set it up in defence against such debt. A surety cannot be said to "acquire" a demand against the principal debtor, under our statute, until he pays the debt for which he is liable.

We find nothing in the decisions of those States where the law of set-off depends upon similar statutes, which differs from the law of this Commonwealth. In *Martin v. Kunzmüller*, 37 N. Y. 396, under a statute which provided that a demand existing against the plaintiff at the time of the assignment, and belonging to the defendant before notice of such assignment, might be set off, if it were such as might have been set off against the plaintiff while the contract belonged to him, it was decided that, in an action by the assignee, the defendant could not offset a note made by the assignor which fell due after the assignment of the contract in suit, and it was said that an allowance to a party by way of set-off was always founded on an existing demand *in presenti*, and not on one that might be claimed *in futuro*.

The same doctrine was laid down by Denio, J. in *Myers v. Davis*, 22 N. Y. 489.

In *Carpenter v. Coit*, 1 D. Chip. 88, it was decided that the defendant in an action on a note could not set off a liability incurred before the commencement of the action, against which the plaintiff was bound to indemnify him, unless the defendant paid the demand previously to the bringing of the action; and it was suggested that if the plaintiff had agreed to allow whatever the defendant might be compelled to pay, then the defendant might have justice in the case consistently with the rules of law and without the aid of the statute of set-off. See also *Cummings v. Fullam*, 13 Vt. 434; *Houston v. Fellows*, 27 Vt. 634. A surety who pays the debt of his principal after the commencement of an action against him by the principal cannot set off that payment in such action. *Houghton v. Houghton*, 37 Maine, 72. *Bartlett v. Pearson*, 29 Maine, 9, 15. *Greene v. Darling*, 5 Mason, 201. *Dunklee v. Greenfield Steam Mill Co.* 3 Foster, 245, 250. *Cox v. Cooper*, 3 Ala. 256. *Follett v. Buyer*, 4 Ohio St. 586.

At the time when the note in suit became due, the note of Backus which the defendants seek to use in set-off was due, not to Baker or his legal representatives, but to the person to whom Baker had indorsed it. There is no principle of law which compels Backus, in the absence of any agreement, to apply, by way of set-off or otherwise, the amount of the unpaid outstanding note in satisfaction of his note against Baker. This would be to make him liable to pay the same note at the same time to both the payee and his indorsee.

The fact that Backus was insolvent, and that his insolvency was known to the assignees at the time of the transfer, cannot affect the rules of set-off which govern in actions at law. The insolvency of Backus does not change the present rights of the parties, although it may render it more probable that Baker's estate may by payment acquire some future claim against him.

In a suit in equity brought in this court by the defendants in this action against the present plaintiffs, to enforce in set-off another promissory note, not then due, made by Backus to Baker, on the ground of the insolvency of Backus, the bill was dismissed. It was said by the court, "Whatever may be the rights of a party.

whose debt is due and payable, to compel an insolvent debtor to set off a claim against him not due, we are clearly of opinion that a party, whose debt is not due, has no equitable claim to have it set off against a debt of his own, already due, in the hands of a party who is insolvent." *Spaulding v. Backus*, 122 Mass. 553, 556. It appears to have been conceded in that case that such set-off could not be allowed. See also *Backus v. Spaulding*, 116 Mass. 418.

The statement of the executors to the plaintiffs in interest at the time of the assignment, to the effect that they had claims enough to satisfy the note, is not sustained by the evidence. As we have seen, they had no claims which they had the right so to apply.

The cases relied on by the defendants in support of their claim appear to be cases arising in courts of exclusive jurisdiction in equity, or where, as in Pennsylvania, in the absence of such courts, relief in equity under statute provisions or otherwise is administered to a limited extent by courts of law.

A majority of the court is therefore of opinion, that there must be

Judgment on the verdict for the plaintiff.

C. Delano, for the defendants, cited *Greene v. Hatch*, 12 Mass. 195; *Sargent v. Southgate*, 5 Pick. 312; *Ranger v. Cary*, 1 Met. 369; *Thayer v. Crossman*, 1 Met. 416; *Baxter v. Little*, 6 Met. 7; *Commonwealth v. Phoenix Bank*, 11 Met. 129; *Ferguson v. Fisk*, 28 Conn. 501; *Adams v. Soule*, 33 Vt. 538; *Beaver v. Beaver*, 23 Penn. St. 167; *Thompson v. McClelland*, 29 Penn. St. 475; *Murray v. Lytlburn*, 2 Johns. Ch. 441; *Brittain v. Quiet*, 1 Jones Eq. 328; *Harper v. Reno*, 1 Freem. Ch. 323; *Mangles v. Dixon*, 3 H. L. Cas. 702, 731; *Maitland v. Backhouse*, 16 Sim. 58.

D. W. Bond & H. H. Bond, for the plaintiff.

WILLIAM WHITING, administrator, *vs.* MASSACHUSETTS
MUTUAL LIFE INSURANCE COMPANY.

Hampden. Sept. 24, 1879. — Sept. 10, 1880. ENDICOTT & LORD, JJ., absent.

If a policy of life insurance contains the provision that the policy "shall not take effect until the advance premium hereon shall have been paid during the lifetime of the person whose life is hereby insured," a payment of such premium by a third person, without the knowledge of the assured, is of no effect, although made with his money; and his administrator cannot ratify the act.

COLT, J. It is expressly provided in the policy of life insurance upon which this action is brought, that it "shall not take effect until the advance premium hereon shall have been paid during the lifetime of the person whose life is hereby insured."

It appeared at the trial, that, in February, Henry L. Fairfield, the plaintiff's intestate, made application for insurance in the defendant company; and that, in the early part of May following, the policy in suit was left at Fairfield's place of business, by an agent of the company, who by letter requested payment of the premium "if the policy was correct and satisfactory." This request was repeated by letter dated May 21, addressed to Fairfield, who was then at home, having arrived there in ill health on the 18th of the same month. He died of this illness on May 27. The letter of the 21st was opened by his sister, who, without communication with or direction from him, caused the advance premium to be paid to the company, by a check signed by a member of the firm in which Fairfield was a partner. Fairfield died without knowledge of this payment.

Upon this state of facts, it is plain that no contract of insurance existed between the parties at the time of the death of the plaintiff's intestate. The possession of the policy, without a waiver, on the part of the company, of the condition upon the performance of which it was to take effect, does not, on the facts disclosed, show a delivery of it in completion of the contract, or furnish any evidence that the minds of the parties had met. It is not enough that the form of the policy had been approved, for it was still optional with Fairfield whether he would by payment make it a binding contract. If he declined or neglected to pay, the company would have no claim for the premium against him,

or against his estate, because the risk never attached. A payment by a stranger, made without the knowledge or consent of the assured, though made with his money, would not bind him or the company; and the money, so wrongfully appropriated, could be recovered back by him or by his administrator. *Hoyt v. Mutual Benefit Ins. Co.* 98 Mass. 539. *Markey v. Mutual Benefit Ins. Co.* 103 Mass. 78. *Badger v. American Ins. Co.* 103 Mass. 244. *Thayer v. Middlesex Ins. Co.* 10 Pick. 326. *Piedmont & Arlington Ins. Co. v. Ewing*, 92 U. S. 377.

After the death of Fairfield, the administrator of his estate, and the widow, to whom the policy was made payable, joined in the proofs of loss, and the administrator, for the benefit of the widow, brought this action against the company. But these proceedings do not amount to such ratification of the unauthorized payment by the sister as will give validity to the policy. The difficulty is, that there was no contract existing at the time of the death to be ratified. The payment of the premium was not the payment by another of a debt due from the intestate, which the administrator, without affecting the rights of the company, would have power to ratify; and to say that the administrator may now do it, so as to bind the company, would be to say that a policy of life insurance may be made to take effect as a contract by an act of ratification by the administrator after the death of the person whose life is thereby insured; or, as was said by Mr. Justice Miller in *Piedmont & Arlington Ins. Co. v. Ewing*, above cited, "to affirm that one party to a negotiation can delay his consent to the terms of the contract until the changes of fortune enable him to reap all the benefits, and throw all the losses on the other side, and then, for the first time, do what was necessary on his part to make the contract obligatory."

It is laid down, in general rules governing the relation of principal and agent, that no unauthorized act of the latter can be made valid by subsequent ratification to the prejudice of third persons without their consent; and that no ratification is valid unless the principal at the time of ratifying the act has power to confer the authority for such act. *Sturtevant v. Robinson*, 18 Pick. 175. *Bird v. Brown*, 4 Exch. 786. *McCracken v. San Francisco*, 16 Cal. 591, 624. Story on Agency, §§ 245, 246.

It is contended that there is some authority for the proposition that the payment of a renewal premium by a stranger to the contract after it becomes due will be sufficient to prevent the lapsing of a policy on the life of one who dies after it becomes due and before it is paid; although the policy contains the usual condition requiring its payment in order to continue the contract in force. But the case of *Howell v. Knickerbocker Ins. Co.* 44 N. Y. 276, cited by the plaintiff, was decided expressly on the ground that there had been a waiver by the company of a prompt payment of the annual premium, so that the contract of insurance was in force at the time of the death. See also *Pritchard v. Merchant's & Tradesman's Assurance Society*, 3 C. B. (N. S.) 622. Whatever may be the law as applicable to the payments of annual premiums under a policy which has once attached, we are of opinion that the contract cannot be originally created without the consent of the assured.

Under the law of marine insurance, as laid down in the cases cited by the plaintiff,* it is said that when a vessel is insured by a part-owner for the benefit of the other part-owners, without their previous authority, the latter may ratify the act, after knowledge of the loss. But that is because in those cases a valid contract of insurance is at once created by the part-owner by payment of the premium, or by a promise to pay upon which the policy is issued.

The judge at the trial refused to rule, as requested by the defendant, that the payment of the premium by the sister, Miss Whiting, would not be a payment by Fairfield which would make the defendant liable on the policy; and for this refusal, the entry must be

Exceptions sustained.

G. Wells, for the defendant.

G. M. Stearns, for the plaintiff.

* The plaintiff's counsel cited on this point *Hagedorn v. Oliverson*, 2 M. & S. 485; *Routh v. Thompson*, 13 East, 274; *Barlow v. Leckie*, 4 J. B. Moore, 8; *Finney v. Fairhaven Ins. Co.* 5 Met. 192.

WALTER H. ROSS vs. JOSEPH M. ROSS.

Hampden. Sept. 25, 1878. — Sept. 28, 1880. AMES & SOULE, JJ., absent

The status of any person, with the inherent capacity of succession or inheritance, is to be ascertained by the law of the domicil which creates the status, at least when the status is one which may exist under the laws of the State in which it is called in question, and when there is nothing in those laws to prevent giving full effect to the status and capacity acquired in the State of the domicil.

A child adopted, with the consent of its father and the sanction of a judicial decree, in another State, where the parties are domiciled at the time, under a statute by which a child so adopted has the same rights of inheritance as legitimate offspring in the estate of the adopting father, is entitled, after the adopting father and the adopted child have removed their domicil into this Commonwealth, to inherit here the real estate of such father as against his collateral heirs; although his wife has given no formal consent to the adoption, as is required under the statutes of adoption of this Commonwealth.

WRIT OF ENTRY brought by an infant, by his next friend, to recover a parcel of land in Springfield. The case was submitted to the Superior Court upon the following statement of facts:

In May 1871, and for several years previous, James M. Ross and Cynthia B. Ross resided in the county of Erie and State of Pennsylvania. On March 13, 1871, James M. Ross presented to the Court of Common Pleas for said county of Erie his petition representing "that he is desirous of adopting Walter H. Smith" (the present demandant), "an infant son, of the age of five months, of John Wesley Smith, and Mary Smith, now deceased, of said county, as one of his heirs, and for that purpose he herein declares his said desire, and also that he will perform all the duties of a parent to said Walter H. Smith;" and therefore praying the court to decree that said Walter H. Smith might assume his name, and have all the rights of a child and heir of said James M. Ross, and be subject to the duties of such child. The petition was signed and sworn to by James M. Ross, and was also signed by John Wesley Smith, the surviving parent of the child, for the purpose of giving his consent to such adoption. After due proceedings had upon the petition, that court, at May term 1871, as appears by its records, "being satisfied that the welfare of said minor, Walter H. Smith, will be promoted by the

adoption prayed for, and further that the surviving parent of said child consents to said adoption, ordered, adjudged and decreed that the said child shall assume the name Walter H. Ross, and have all the rights of a child and heir of the said James M. Ross, and be subject to all the duties of said child." At that time the statute of Pennsylvania of 1855, c. 456, which is copied in the margin,* was the law in force in that State relating to the adoption of children; and under the law of that State the demandant became the adopted child of James M. Ross.

Afterwards, in the year 1871, James M. Ross with his wife and the demandant came to reside in Springfield in this Commonwealth, and continued to reside in Springfield until May 1878, when James M. Ross died intestate, the owner in fee of the demanded premises, and leaving no other child than the demandant.

Both parties claim title to the demanded premises; the demandant as the child and heir of James M. Ross, and the tenant as brother of James M. Ross.

Allen, J. ruled *pro forma* that the demandant had not maintained his case; ordered judgment for the tenant; and reported the case to this court. If, upon this statement of facts, the demandant was not entitled to be recognized as a child and heir of

* That statute, after giving the Court of Common Pleas jurisdiction in certain matters, enacts, in § 7, that "it shall be lawful for any person desirous of adopting any child as his or her heir, or as one of his or her heirs, to present his or her petition to such court in the county where he or she may be resident, declaring such desire, and that he or she will perform all the duties of a parent to such child; and such court, if satisfied that the welfare of such child will be promoted by such adoption, may, with the consent of the parents or surviving parent of such child, or, if none, of the next friend of such child, or of the guardians or overseers of the poor, or of such charitable institution as shall have supported such child for at least one year, decree that such child shall assume the name of the adopting parent, and have all the rights of a child and heir of such adopting parent, and be subject to the duties of such child, of which the record of the court shall be sufficient evidence: Provided, that, if such adopting parent shall have other children, the adopted shall share the inheritance only as one of them in case of intestacy, and he, she or they shall respectively inherit from and through each other, as if all had been the lawful children of the same parent."

James M. Ross under the laws of this Commonwealth, the judgment was to stand; otherwise, judgment to be entered for the demandant.

N. A. Leonard & G. Wells, for the demandant.

J. M. Ross, pro se.

GRAY, C. J. This case presents for adjudication the question which it was attempted to raise in *Ross v. Ross*, 123 Mass. 212, namely, whether a child adopted, with the sanction of a judicial decree, and with the consent of his father, by another person, in a State where the parties at the time have their domicil, under statutes substantially similar to our own, and which, like ours, give a child so adopted the same rights of succession and inheritance as legitimate offspring in the estate of the person adopting him, is entitled, after the adopting parent and the adopted child have removed their domicil into this Commonwealth, to inherit the real estate of such parent in this Commonwealth upon his dying here intestate.

The question how far a child, adopted according to law in the State of the domicil, can inherit lands in another State, was mentioned by Lord Brougham in *Doe v. Vardill*, 7 Cl. & Fin. 895, 898, and by Chief Justice Lowrie in *Smith v. Derr*, 34 Penn. St. 126, 128; but, so far as we are informed, has never been adjudged. It must therefore be determined upon a consideration of general principles of jurisprudence, and of the judicial application of those principles in analogous cases.

As a general rule, when no rights of creditors intervene, the succession and disposition of personal property are regulated by the law of the owner's domicil. It is often said, as in *Cutter v. Davenport*, 1 Pick. 81, 86, cited by the tenant, to be a settled principle, that "the title to and the disposition of real estate must be exclusively regulated by the law of the place in which it is situated." But so general a statement, without explanation, is liable to mislead. The question in that case was of the validity of an assignment of a mortgage of real estate; and there is no doubt that by our law the validity, as well as the form, of any instrument of transfer of real estate, whether a deed or a will, is to be determined by the *lex rei sitæ*. *Goddard v. Sawyer*, 9 Allen, 78. *Sedgwick v. Laflin*, 10 Allen, 430, 433. *United States v. Crosby*, 7 Cranch, 115. *Clark v. Graham*, 6 Wheat

577. *Kerr v. Moon*, 9 Wheat. 565. *McCormick v. Sullivant*, 10 Wheat. 192.

It is a general principle, that the status or condition of a person, the relation in which he stands to another person, and by which he is qualified or made capable to take certain rights in that other's property, is fixed by the law of the domicile; and that this status and capacity are to be recognized and upheld in every other State, so far as they are not inconsistent with its own laws and policy. Subject to this limitation, upon the death of any man, the status of those who claim succession or inheritance in his estate is to be ascertained by the law under which that status was acquired; his personal property is indeed to be distributed according to the law of his domicile at the time of his death, and his real estate descends according to the law of the place in which it is situated; but, in either case, it is according to those provisions of that law which regulate the succession or the inheritance of persons having such a status.

The capacity or qualification to inherit or succeed to property, which is an incident of the status or condition, requiring no action to give it effect, is to be distinguished from the capacity or competency to enter into contracts that confer rights upon others. A capacity to take and have differs from a capacity to do and contract; in short, a capacity of holding from a capacity to act. Generally speaking, the validity of a personal contract, even as regards the capacity of the party to make it, as in the case of a married woman or an infant, is to be determined by the law of the State in which it is made. *Milliken v. Pratt*, 125 Mass. 374, and authorities cited. *Polydore v. Prince*, 1 Ware, 402, 408-413. *Bell v. Packard*, 69 Maine, 105. *Bond v. Cummings*, 70 Maine, 125. *Wright v. Remington*, 12 Vroom, 48. Sir William Scott in *Dalrymple v. Dalrymple*, 2 Hagg. Consist. 54, 61. Lord Brougham in *Warrender v. Warrender*, 2 Cl. & Fin. 488, 544; *S. C.* 9 Bligh N. R. 89, 120; 2 Sh. & Macl. 154, 214. *Simonin v. Mallac*, 2 Sw. & Tr. 67, 77. *Sottomayer v. De Barros*, 5 P. D. 94, 100. And the validity of any transfer of real estate by act of the owner, whether *inter vivos* or by will, is to be determined, even as regards the capacity of the grantor or testator, by the law of the State in which the land is situated. Story Conf. §§ 431, 474. But the status or condition of any person,

with the inherent capacity of succession or inheritance, is to be ascertained by the law of the domicile which creates the status, at least when the status is one which may exist under the laws of the State in which it is called in question, and when there is nothing in those laws to prohibit giving full effect to the status and capacity acquired in the State of the domicile.

A person, for instance, who has the status of child of another person in the country of his domicile, has the same status here, and as such takes such share of the father's personal property as the law of the domicile gives him, and such share of his real estate here as a child takes by the laws of this Commonwealth, unless excluded by some positive rule of our law. Inheritance is governed by the *lex rei sitæ*; but legitimacy is to be ascertained by the *lex domicilii*. If a man domiciled in England has two legitimate sons there, and dies intestate, owning land in this Commonwealth, both sons have the status of legitimate children here; but, by virtue of our statute of descents, the land descends to them equally, and not to the eldest son alone, as by the law of England.

If a marriage (in the proper sense of the term, not including Mormon or other polygamous marriages; *Hyde v. Hyde*, L. R. 1 P. & D. 130) is celebrated in one State, according to the form prescribed by its laws, between persons domiciled there, and competent to intermarry, it is universally admitted that the woman must be recognized everywhere as the lawful wife of the man, and entitled as such upon his death to such dower in his lands as the law of the State in which they are situated allows to a widow; although it is this law, and not the law of the domicile, which fixes the proportion that she shall take. *Ilderton v. Ilderton*, 2 H. Bl. 145. *Doe v. Vardill*, 2 Cl. & Fin. 571, 575, 576; *S. C.* 9 Bligh N. R. 32, 47, 48. *Potter v. Titcomb*, 22 Maine, 300. *Lamar v. Scott*, 3 Strob. 562. *Jones v. Gerock*, 6 Jones Eq. 190. Story Conf. §§ 159, 454.

Our law goes beyond this in recognizing the validity of foreign marriages, and holds that, the relation of husband and wife being a status based upon the contract of the parties, and recognized by all Christian nations, the validity of that contract, if not polygamous, nor incestuous according to the general opinion of Christendom, is governed, even as regards the competency of

the contracting parties, by the law of the place of the contract; that this status, once legally established, should be recognized everywhere as fully as if created by the law of the domicile; and therefore that any such marriage, valid by the law of the place where it is contracted, is, even if contracted between persons domiciled in this Commonwealth and incompetent to marry here under our laws, (except so far as the Legislature has clearly enacted that such marriages out of the Commonwealth shall be deemed void here,) valid here to all intents and effects, civil or criminal, including the settlement of the wife and children, her right of dower, and their legitimacy and capacity to inherit the father's real estate. *Parsons, C. J. in Greenwood v. Curtis*, 6 Mass. 358, 377-379. *Medway v. Needham*, 16 Mass. 157. *West Cambridge v. Lexington*, 1 Pick. 506. *Putnam v. Putnam*, 8 Pick. 433. *Commonwealth v. Lane*, 113 Mass. 458. *Bullock v. Bullock*, 122 Mass. 3. *Milliken v. Pratt*, 125 Mass. 380, 381.

As to foreign divorces, it is well settled in this Commonwealth, that a decree of divorce rendered in another State, in which the legal domicile of the parties is at the time, and according to its laws, even for a cause which is not a ground of divorce by our laws, and although their marriage took place while they were domiciled in this Commonwealth, is valid here, and conclusive in a suit concerning the husband's interest or the wife's dower in lands in this Commonwealth. *Barber v. Root*, 10 Mass. 260. *Clark v. Clark*, 8 Cush. 385. *Hood v. Hood*, 11 Allen, 196. *Hood v. Hood*, 110 Mass. 463. *Burlen v. Shannon*, 115 Mass. 438. *Sewall v. Sewall*, 122 Mass. 156. The provision of the existing statutes, affirming the validity of foreign divorces, made no change in the law; but, in the words of the Commissioners upon whose advice it was first enacted, "is founded on the rule established by the comity of all civilized nations; and is proposed merely that no doubt should arise on a question so interesting and important as this may sometimes be." Rev. Sts. c. 76, § 40, and note of Commissioners. Gen. Sts. c. 107, § 55. The leading case of *Barber v. Root*, above cited, arose and was determined before the enactment of this provision. And in England, since the establishment of a court vested with power to grant divorces from the bond of matrimony, the tendency of the judges is to recognize the validity of a foreign divorce between English

persons married in England, but domiciled in good faith at the time of the divorce in the foreign State, at least for a cause which would be a cause of divorce in England. See Dicey on Domicil, 234-237, 353-355; *Harvey v. Farnie*, 5 P. D. 153.

Another class of cases requires more particular examination. By the rule of the common law, which is the law of England to this day, and formerly prevailed throughout the United States, a child not born in lawful matrimony is not deemed the child of his father, although the parents subsequently intermarry, but is indelibly a bastard. By the rule of the civil law, on the other hand, which has been adopted in Scotland, as well as in France, Germany, and other parts of Europe, and more recently in many States of the Union, such a child may become legitimate upon the subsequent marriage of his parents.

The leading case in Great Britain on this subject is *Shedden v. Patrick*, briefly reported in Morison's Dict. Dec. Foreign, Appx. I. No. 6, and more fully in 5 Paton, 194, which was decided by the House of Lords, on appeal from the Scotch Court of Session, in 1808, and in which a Scotchman, owning land in Scotland, became domiciled in New York, and there cohabited with an American woman, had a son by her, and afterwards married her, and died there; and the son was held not entitled to inherit his land in Scotland. Two questions were argued: 1st. Whether the plaintiff, being by the law of the country where he was born, and where his parents were domiciled at the time of his birth and of their subsequent marriage, a bastard and not made legitimate by such marriage, could inherit as a legitimate son in Scotland, the law of which allows legitimation by subsequent matrimony. 2d. Whether, being a bastard, and therefore *nullius filius* at the time of his birth in America, he was an alien and therefore incapable of inheriting land in Great Britain; the act of Parliament of 4 Geo. II. c. 21, making only those children, born out of the ligeance of the British crown, natural-born subjects, whose fathers were such subjects "at the time of the birth of such children respectively." The Court of Session decided the case upon the first ground. In the House of Lords, after full argument of both questions by Fletcher and Brougham for the appellant and by Romilly and Nolan for the respondent, Lord Chancellor Eldon, speaking for himself and Lord Redesdale,

said that, "as it was not usual to state any reasons for affirming the judgment of the court below, he should merely observe that the decision in this case would not be a precedent for any other which was not precisely the same in all its circumstances," and thereupon moved that the judgment of the Court of Session should be affirmed, which was accordingly ordered. On a suit brought forty years afterwards by the same plaintiff against the same defendant to set aside that judgment for fraud in procuring it, the House of Lords in 1854, without discussing the first point except so far as it bore upon the question whether there had been any fraudulent suppression of facts relating to the father's domicile, held that the plaintiff was an alien at the time of his birth, and could not be afterward naturalized except by act of Parliament. *Shedden v. Patrick*, 1 Macq. 535.

But the remark of Lord Eldon, above quoted, in moving judgment in the original case, and the statements made in subsequent cases by him, by Lord Redesdale, who concurred in that judgment, and by Lord Brougham, who was of counsel in that case, clearly show that the judgment in the House of Lords, as well as in the Court of Session, went upon the ground that the child was illegitimate because the law of the foreign country, in which the father was domiciled at the time of the birth of the child and of the subsequent marriage of the parents, did not allow legitimation by subsequent matrimony. Lord Eldon's judgment in the *Strathmore Peerage Case*, 4 Wils. & Sh. Appx. 89-91, 95; *S. C.* 6 Paton, 645, 656, 657, 662. Lord Redesdale's judgment in *S. C.* 4 Wils. & Sh. Appx. 93, 94, and 6 Paton, 660, 661; expounded by Lord Lyndhurst, in the presence and with the concurrence of Lord Eldon, in *Rose v. Ross*, 4 Wils. & Sh. 289, 295-297, 299; *S. C. nom. Munro v. Saunders*, 6 Bligh N. R. 468, 472-475, 478. Lord Brougham in *Doe v. Vardill*, 2 Cl. & Fin. 571, 587, 592, 595, 600; *S. C.* 9 Bligh N. R. 32, 75, 80, 83; in *Munro v. Munro*, 7 Cl. & Fin. 842, 885; *S. C.* 1 Robinson H. L. 492, 615; and in *Shedden v. Patrick*, 1 Macq. 622.

That decision is wholly inconsistent with the theory that upon general principles, independently of any positive rule of law, the question whether a person claiming an inheritance in real estate is the lawful child of the last owner is to be determined by the *lex rei sitæ*; for, if that law had been applicable to that question

the plaintiff must have been held to be the legitimate heir; and it was only by trying that question by the law of the domicile of his father that he was held to be illegitimate. The decision receives additional interest and weight from the fact that the case for the appellant (which is printed in 1 Macq. 539-552) was drawn up by Mr. Brougham, then a member of the Scotch bar, and contained a very able statement of reasons why the *lex rei sitæ* should govern.

In later cases in the House of Lords, like questions have been determined by the application of the same test of the law of the domicile. In the case of the *Strathmore Peerage*, above cited, which was what is commonly called a Scotch peerage, having been such a peerage before the union of the two kingdoms, the last peer was domiciled in England, had an illegitimate son there by an Englishwoman, and married her in England; and it was held that by force of the law of England the son did not inherit the peerage. So in *Rose v. Ross*, above cited, where a Scotchman by birth became domiciled in England, and had a son there by an Englishwoman, and afterwards went to Scotland with the mother and son, and married her there, retaining his domicile in England, and then returned with them to England and died there, it was held that the son could not inherit the lands of the father in Scotland, because the domicile of the father, at the time of the birth of the child and of the subsequent marriage, was in England. On the other hand, where a Scotchman, domiciled in Scotland, has an illegitimate son born in England, and afterwards marries the mother, either in England, whether in the Scotch or in the English form, or in Scotland, the son inherits the father's land in Scotland, because, the father's domicile being throughout in Scotland, the place of the birth or marriage is immaterial. *Dalhousie v. McDouall*, 7 Cl. & Fin. 817; *S. C.* 1 Robinson H. L. 475. *Munro v. Munro*, 7 Cl. & Fin. 842; *S. C.* 1 Robinson H. L. 492. *Aikman v. Aikman*, 3 Macq. 854. *Udny v. Udny*, L. R. 1 H. L. Sc. 441.

In the well known case of *Doe dem. Birtwhistle v. Vardill*, it was indeed held by the Court of King's Bench in the first instance, and by the House of Lords on writ of error, after two arguments, at each of which the judges attended and delivered an opinion, that a person born in Scotland, and there legitimate

by reason of the subsequent marriage of his parents in Scotland, they having had their domicil there at the time of the birth and of the marriage, could not inherit land in England. 5 B. & C. 438; 8 D. & R. 185. 2 Cl. & Fin. 571; 9 Bligh N. R. 32. 7 Cl. & Fin. 895; 6 Bing. N. C. 385; 1 Scott N. R. 828, West H. L. 500.

One curious circumstance connected with that case is, that, under the English usage which allows counsel in a cause, if raised to the bench during its progress, to sit as judges in it, Chief Justice Tindal, who had argued the case for the plaintiff in the King's Bench, gave the opinion of the judges in the House of Lords in accordance with which judgment was finally rendered for the defendant; and Lord Brougham, who had taken part as counsel for the defendant in the first argument in the House of Lords, was most reluctant, for reasons which he stated with characteristic fulness and power, to concur in that judgment. 5 B. & C. 440. 2 Cl. & Fin. 582-598. 7 Cl. & Fin. 924, 940-957.

But that case, as clearly appears by the opinions of Chief Justice Abbott and his associates in the King's Bench, as well as by that of the judges, delivered by Chief Justice Tindal, and those of Lord Brougham and Lord Cottenham, after the rehearing in the House of Lords, was decided upon the ground that, admitting that the plaintiff must be deemed the legitimate son of his father, yet, by what is commonly called the Statute of Merton, 20 Hen. III. c. 9, the Parliament of England, at a time when the English Crown had possessions on the Continent in which legitimation by subsequent matrimony prevailed, had, although urged by the bishops to adopt the rule of the civil and canon law, by which children born before the marriage of their parents are equally legitimate as to the succession of inheritance with those born after marriage, positively refused to change the law of England as theretofore used and approved. The *ratio decidendi* is most clearly brought out by Mr. Justice Littledale and by Chief Justice Tindal.

Mr. Justice Littledale said: "One general rule applicable to every course of descent is, that the heir must be born in lawful matrimony. That was settled by the Statute of Merton, and we cannot allow the comity of nations to prevail against it. The

very rule that a personal status accompanies a man everywhere is admitted to have this qualification, that it does not militate against the law of the country where the consequences of that status are sought to be enforced. Here it would militate against our statute law to give effect to that status of legitimacy acquired by the lessor of the plaintiff in Scotland. He cannot, therefore, be received as legitimate heir to land in England." 5 B. & C. 455.

Upon the first argument in the House of Lords, Chief Baron Alexander, adopting the sentiment and the language of Sir William Scott in *Dalrymple v. Dalrymple*, 2 Hagg. Consist. 58, 59, "varied only so far as to apply to a question of legitimacy what was said of a question respecting the validity of a marriage," said, in the name of all the judges who attended at that argument, "The cause being entertained in an English court must be adjudicated according to the principles of English law applicable to such a case; but the only principle applicable to such a case by the law of England is, that the status or condition of the claimant must be tried by reference to the law of the country where the status originated; having furnished this principle, the law of England withdraws altogether, and leaves the question of status in the case put to the law of Scotland." The learned Chief Baron added, "The comity between nations is conclusive to give to the claimant the character of the eldest legitimate son of his father, and to give him all the rights which are necessarily consequent upon that character." 2 Cl. & Fin. 573-575. The grounds upon which, notwithstanding this, he undertook, without alluding to the Statute of Merton and the practice under it, to maintain that, by the rules of inheritance and descent which the law of England had impressed upon all land in England, the plaintiff could not recover, were so unsatisfactory to the Lords, that Lord Brougham, at that stage of the case, declared that he entertained a very strong opinion that the case was wrongly decided in the court below, and Lord Lyndhurst and Lord Denman concurred in his motion that the case should be reargued. 2 Cl. & Fin. 598-600.

In delivering the opinion of the judges after the second argument Chief Justice Tindal said: "The grounds and foundation upon which our opinion rests are briefly these: That we hold it

to be a rule or maxim of the law of England with respect to the descent of land in England from father to son, that the son must be born after actual marriage between his father and mother; that this is a rule *juris positivi*, as are all the laws which regulate succession to real property, this particular rule having been framed for the direct purpose of excluding, in the descent of land in England, the application of the rule of the civil and canon law, by which the subsequent marriage between the father and mother was held to make the son born before marriage legitimate; and that this rule of descent, being a rule of positive law annexed to the land itself, cannot be allowed to be broken in upon or disturbed by the law of the country where the claimant was born, and which may be allowed to govern his personal status as to legitimacy, upon the supposed ground of the comity of nations." 7 Cl. & Fin. 925.

The Chief Justice then proceeded to make an elaborate statement of the provisions of the Statute of Merton, and of the circumstances under which it was passed, particularly dwelling upon the facts that at the time of its passage Normandy, Aquitaine and Anjou were under the allegiance of the King of England, and those born in those dominions were natural-born subjects and could inherit land in England, and that many of the peers who attended appeared to have been of foreign lineage if not of foreign birth, and were, at all events, well acquainted with the rule of law which was then so strongly contested, "yet, notwithstanding the rule of the civil and canon law prevailed in Normandy, Aquitaine and Anjou, by which the subsequent marriage makes the *antenatus* legitimate for all purposes and to all intents; and notwithstanding the precise question then under discussion was whether this rule should govern the descent of land locally situate in England, or whether the old law and custom of England should still continue as to such land, under which the *antenatus* was incapable to take land by descent; there is not the slightest allusion to any exception in the rule itself as to those born in the foreign dominions of the Crown, but the language of the rule is, in its terms, general and universal as to the succession to land in England." And he fortified his position that no such exception was intended, by referring to the forms of writs before and after the passage of the statute,

and to Glanville, Bracton and other early authorities. 7 Cl. & Fin. 926-933.

It was upon the "very great new light" thus thrown upon the question, and the "very important additions" thus made to the former arguments, that Lord Brougham, though not wholly convinced, waived his objections to judgment for the defendant. 7 Cl. & Fin. 939, 943-946, 956. And Lord Cottenham, the only other law lord present, in moving that judgment, said, "I am extremely satisfied with the ground upon which the judges put it, because they put the question on a ground which avoids the difficulty that seems to surround the task of interfering with those general principles peculiar to the law of England, principles that at first sight seem to be somewhat at variance with the decisions to which the courts have come." 7 Cl. & Fin. 957. And see Lord Brougham, Lord Cranworth and Lord Wensleydale, in *Fenton v. Livingstone*, 3 Macq. 497, 532, 544, 550.

In the case of *Don's Estate*, 4 Drewry, 194, Vice Chancellor Kindersley declared that the general principle was that "the legitimacy or illegitimacy of any individual is to be determined by the law of that country which is the country of his origin; if he is legitimate in his own country, then all other countries, at least all Christian countries, recognize him as legitimate everywhere;" and that the ground of the decision in *Doe v. Vardill* was, that, admitting the personal status of legitimacy, the law of England attached to land certain rules of inheritance which could not be departed from. And he therefore held that, assuming that a son born in Scotland before the marriage of his parents domiciled there, and there legitimate in consequence of their subsequent marriage, was legitimate all over the world, at any rate in England, yet, as he could not inherit land in England from his father or from any other person, so no other person could succeed to him by inheritance except his own issue.

So in *Shaw v. Gould*, L. R. 3 H. L. 55, 70, Lord Cranworth said of *Doe v. Vardill*: "The opinions of the judges in that case, and of the noble lords who spoke in the House, left untouched the question of legitimacy, except so far as it was connected with succession to real estate. I think they inclined to the opinion that for purposes other than succession to real estate, for purposes unaffected by the Statute of Merton, the law of the domicile

would decide the question of status. No such decision was come to, for no question arose except in relation to heirship to real estate. But the opinions given in the case seem to me to show a strong bias towards the doctrine that the question of status must, for all purposes unaffected by the feudal law, as adopted and acted on in this country, be decided by the law of the domicil."

In *Skottowe v. Young*, L. R. 11 Eq. 474, the proceeds of lands in England were devised by a British subject domiciled in France, in trust to sell and to pay the proceeds to his daughters born of a Frenchwoman before marriage, but afterwards legitimated according to the law of France; and it was held by Vice Chancellor Stuart, in accordance with a previous dictum of Lord Chancellor Cranworth, in *Wallace v. Attorney General*, L. R. 1 Ch. 1, 8, that the daughters were not "strangers in blood," within the meaning of the English legacy duty act. The Vice Chancellor observed that in *Doe v. Vardill* the claimant was admitted to have in England the status of the eldest legitimate son of his father, and failed in his suit only because he could not prove that he was heir according to the law of England in which the land was; that this will was that of a domiciled Frenchman, and his status and that of his children must be their status according to the law of France, which, according to *Doe v. Vardill*, constituted their English status; and that "the status of these ladies being that of daughters legitimated according to the law of France by a declaration of the father, it is impossible to hold that they are for any purpose strangers in blood, on the mere ground that, if they had been English, and their father domiciled in England, they would have been illegitimate."

It may require grave consideration, when the question shall arise, whether the legitimacy of a child, depending upon marriage of its parents or other act of acknowledgment after its birth, should not be determined by the law of the domicil at the time of the act which effects the legitimation, rather than by the law of the domicil at the time of the birth, or even of the marriage, when some other acknowledgment is necessary. See Sir Samuel Romilly's argument in *Shedden v. Patrick*, 5 Paton, 205; printed more at length in 1 Macq. 556-558; Lord Brougham in *Munro v. Munro*, 7 Cl. & Fin. 882; *S. C.* 1 Robinson H. L. 612;

Lord St. Leonards in *Shedden v. Patrick*, 1 Macq. 641; *Stevenson v. Sullivan*, 5 Wheat. 207, 259; 2 Toullier Droit Civil (5th ed.) 217; Savigny's Private International Law, § 380; (Guthrie's ed.) 250 and note, 260.

These authorities do not appear to have been considered in those English cases, in which, under a bequest in an English will to "the children" of an Englishman who afterwards became domiciled in a foreign country, and there married the mother of his illegitimate children born there, whereby they became legitimate by the law of that country, Vice Chancellor Wood (afterwards Lord Hatherley) and Vice Chancellor Stuart were of opinion that those children born before the change of domicile could not take, and differed upon the question whether those born after the change could take, Vice Chancellor Stuart holding that they could, and Vice Chancellor Wood holding that they could not. *Wright's Trust*, 2 K. & J. 595; S. C. 25 L. J. (N. S.) Ch. 621; 2 Jur. (N. S.) 465. *Goodman v. Goodman*, 3 Giff. 643. *Boyes v. Bedale*, 1 Hem. & Mil. 798. Lord Hatherley in *Udny v. Udny*, L. R. 1 H. L. Sc. 441, 447. See also Kindersley, V. C. in *Wilson's Trusts*, L. R. 1 Eq. 247, 264-266; Lord Chelmsford in *S. C. nom. Shaw v. Gould*, L. R. 3 H. L. 55, 80. But those opinions proceeded upon the construction of wills of persons domiciled in England; and Vice Chancellor Wood appears to have admitted that if the father had never been domiciled in England the rule would have been different. *Wright's Trust*, 25 L. J. (N. S.) Ch. 632; S. C. 2 Jur. (N. S.) 472; citing *Ashford v. Tustin*, before Parker, V. C., reported only in Lovell's Monthly Digest, 1852, p. 389. *Udny v. Udny*, L. R. 1 H. L. Sc. 448.

The dictum of Vice Chancellor Wood in *Boyes v. Bedale*, 1 Hem. & Mil. 805, and the decision of Sir George Jessel, M. R., in the case of *Goodman's Trusts*, 14 Ch. D. 619, that the word "children" in the English statute of distributions means only children according to the law of England, and that therefore children born in a foreign country, and legitimated by the law of that country upon the subsequent marriage of their parents there, could not take by representation under that statute as children of their father, although he was domiciled in that country at the time of their birth and of the subsequent marriage, can hardly, as it seems to us, be reconciled with the general

current of judicial opinion in England, as shown by the cases already referred to.

The most accomplished commentators on the subject, English and American, are agreed that the decision in *Doe v. Vardill*, which has had so great an influence with English judges, does not rest upon general principles of jurisprudence, but upon historical, political and constitutional reasons peculiar to England. Westlake's *Private International Law* (ed. 1858) §§ 90-93; (ed. 1880) intro. 9, §§ 53, 168. 4 Phillimore's *International Law* (2d ed.) § 538 note. Dicey on *Domicil*, 182, 188, 191, pref. iv. 2 Kent Com. 117 note *a*, 209 note *a*. 4 Kent Com. 413 note *d*. Story Conf. §§ 87, 87 *a* and note, 93 *i*, 93 *m*. Redfield, in Story Conf. § 93 *w* and note. Whart. Conf. § 242. Upon questions of comity of States, considerations derived from the feudal law, from an act of Parliament of the time of Henry III. and from the constitution and policy of the English government, have no weight in Massachusetts at the present day.

Almost fifty years ago, the Legislature of this Commonwealth enacted that children born before the marriage of their parents and acknowledged by their father afterwards, and legitimate children of the same parents, should inherit from each other as if all had been born in lawful wedlock; but did not make such illegitimate children capable of inheriting from their father. St. 1832, c. 147. Whether this was accidental or designed, the Commissioners on the revision of the statutes in 1835 reported to the Legislature that they had no means to conjecture, not knowing the reasons on which the statute itself was founded, "the whole of it being an innovation upon the law as immemorially practised and transmitted to us by our ancestors;" and therefore proposed a section making no change in this respect, but only expressing what they supposed to have been the intention of the framers of that statute; "leaving it to the wisdom of the Legislature, if they should think fit to continue this law in force, to modify it in such manner as shall be thought proper." Report of Commissioners on Rev. Sts. c. 61, § 4 and note.

The Legislature solved the doubt of the learned Commissioners by making the statute more comprehensive, and enacting it in this form: "When, after the birth of an illegitimate child, his parents shall intermarry, and his father shall, after the marriage,

acknowledge him as his child, such child shall be considered as legitimate to all intents and purposes, except that he shall not be allowed to claim, as representing either of his parents, any part of the estate of any of their kindred, either lineal or collateral." Rev. Sts. c. 61, § 4.

In *Loring v. Thorndike*, 5 Allen, 257, a testator domiciled in this Commonwealth, by a will admitted to probate before the Revised Statutes were passed, bequeathed a sum in trust to pay the income to his son for life, and the principal at his death "to his lawful heirs." After the Revised Statutes took effect, the son, whose domicil also was and continued to be in this Commonwealth, had two illegitimate children in Germany by a German woman, and afterwards married her there in a form authorized by the law of the place, and there acknowledged them as his children. This court held that by the Rev. Sts. c. 61, § 4, such children must be deemed legitimate for all purposes, except of taking by inheritance as representing one of the parents any part of the estate of the kindred, lineal or collateral, of such parent; and that the children took directly under the will of their grandfather, and not as the representatives of their father, and were therefore not within the exception of the statute, but were entitled to the benefit of the bequest.

Still greater changes in the rules of the law of England as to the descent of real estate have been made by subsequent legislation in this Commonwealth. Aliens, whether residing here or abroad, may take, hold, convey and transmit real estate. St. 1852, c. 29. Gen. Sts. c. 90, § 38. *Lumb v. Jenkins*, 100 Mass. 527. And if the parents of an illegitimate child marry, and the father acknowledges him as his child, the child is to be deemed legitimate for all purposes whatsoever, whether of inheritance or settlement or otherwise. St. 1853, c. 253. Gen. Sts. c. 91, § 4. *Monson v. Palmer*, 8 Allen, 551. The statutes of adoption will be referred to hereafter.

In *Smith v. Kelly*, 23 Miss. 167, it was held that the status or condition of a person as to legitimacy must be determined by reference to the law of the country where such status or condition had its origin, and that the status so ascertained adhered to him everywhere; and therefore that where, at the time of the birth of an illegitimate child and of the subsequent marriage

of its parents, they were domiciled in South Carolina, in which such marriage did not make the child legitimate, and afterwards removed with the child to Mississippi, by the law of which State subsequent marriage of the parents and acknowledgment of the child by the father would legitimate it, and the child was always recognized by the father as his child, yet the child, having had the status of illegitimacy in South Carolina, retained that status in Mississippi, and could not inherit or succeed to either real or personal property in Mississippi. That decision is a strong application of the law of the domicile of origin, and perhaps did not give sufficient effect to the father's recognition of the child in Mississippi after they had established their domicile in that State.

In *Scott v. Key*, 11 La. Ann. 232, while a father and his illegitimate son, whose mother he never married, were domiciled in the Territory of Arkansas, the Legislature of that Territory passed a special statute enacting that the son should be made his father's legal heir and representative in as complete a manner as though he had been such from his birth, and should be as capable of inheriting his father's estate in a full and complete manner, as if his father has been married to his mother at the time of his birth, and should be known and called by his father's name; and the father and son afterwards removed to Louisiana. The majority of the court held that the heritable quality of legitimacy, which the son had received from the Legislature of the State of his residence, accompanied him when he changed his domicile, and that he was entitled to inherit his father's immovable property in Louisiana, to the exclusion of the father's brothers and sisters. Chief Justice Merrick dissented, but only upon the ground that to allow such an act to have an extra-territorial effect would be to allow another State to provide a new class of heirs for immovables and successions in Louisiana; and that, in order that personal statutes should be enforced in another country, there must be something in common between the jurisprudence of the two countries; and, speaking of the conflicting rules of the civil law and the common law in regard to legitimation by subsequent matrimony, said, "The doctrine of the civil law ought to be enforced, doubtless, in those cases where our own statute recognizes a mode of legitimation by acknowledgment

by notarial act and subsequent marriage, although the form in which it has been done in another State differs from our own." 11 La. Ann. 239. And see 4 Phillimore, § 542; Savigny (Guthrie's ed.) 258, 260, 264 and note.

In *Barnum v. Barnum*, 42 Md. 251, on the other hand, it was said, in the opinion of the majority of the court, that a special statute of the Legislature of Arkansas, enacting that one person be constituted the heir of another, both of whom had a domicile there, making no reference to any marriage, and not even depending on the one being the child of the other, could have no extraterritorial operation whatever. See pp. 305, 307, 325. But the point decided was, that the former was not an "heir" of the latter, within the meaning of the will of the latter's father, who, nine years before the passage of the Arkansas statute, died domiciled in Maryland, the law of which does not appear to have permitted the creation of an heir in that manner.

The cases on this topic in other States, so far as they have come to our notice, afford little assistance. The decision in *Smith v. Derr*, 34 Penn. St. 126, that a child born out of wedlock, and legitimated by the law of another State where the father and child were domiciled, could not inherit land in Pennsylvania in 1855, was, as the court said, covered by the principle decided in *Doe v. Vardill*; for the Statute of Merton was then in force in Pennsylvania, although since repealed there. See Report of the Judges, 3 Binn. 595, 600; Purd. Dig. (10th ed.) 1004. The decision in *Harvey v. Ball*, 32 Ind. 98, allowing a bastard child of parents who at the time of its birth and of their subsequent intermarriage, and until their death, had their domicile in Pennsylvania, to inherit land in Indiana under a statute of Indiana enacting that "if any man shall marry a woman who has, previous to the marriage, borne an illegitimate child, and after marriage shall acknowledge such child as his own, such child shall be deemed legitimate to all intents and purposes," was put exclusively upon the meaning attributed by the court to that statute, without regard to general principles or cases decided elsewhere; and upon any other ground would be inconsistent with the decision in the leading case of *Shedden v. Patrick*, before cited. In *Lingen v. Lingen*, 45 Ala. 410, in which it was held that a child, born in France of parents who never

intermarried, and there acknowledged by his father according to the forms of the French law, and so made legitimate by that law, could not take a share in the father's estate in Alabama, the father's domicil was always in Alabama, and the child had not been legitimated in any manner allowed by the laws of that State.

The legal adoption by one person of the offspring of another, giving him the status of a child and heir of the parent by adoption, was unknown to the law of England or of Scotland, but was recognized by the Roman law, and exists in many countries on the continent of Europe which derive their jurisprudence from that law. Co. Lit. 7 *b*, 237 *b*. 4 Phillimore, § 531. Mackenzie's Roman Law, 120-124. Whart. Confl. § 251. It was long ago introduced, from the law of France or of Spain, into Louisiana and Texas, and more recently, at various times and by different statutes, throughout New England, and in New York, New Jersey, Pennsylvania, and a large proportion of the other States of the Union. *Fuselier v. Masse*, 4 La. 423. *Vidal v. Commagère*, 13 La. Ann. 516. *Teal v. Sevier*, 26 Tex. 516. Miss. St. 1846; Hutch. Miss. Code, 501. Alabama Code of 1852, § 2011. N. Y. St. 1873, c. 830. N. J. Rev. Sts. of 1877, § 1345. Penn. St. 1855, c. 456; Purd. Dig. 61. 1 Southern Law Rev. (N. S.) 70, 79 and note, citing statutes of other States. One of the first, if not the very first, of the States whose jurisprudence is based exclusively on the common law, to introduce it, was Massachusetts.

By the St. of 1851, c. 324, upon the petition of any inhabitant of this Commonwealth, and of his wife, if he was a married man, for leave to adopt a child not his own by birth, with the consent in writing of its parents, or the survivor of them, or, if neither should be living, of the child's legal guardian, next of kin or next friend, and the consent of the child also if of the age of fourteen years or upwards, the judge of probate of the county in which the petitioner resided, upon being satisfied that the petitioner, or, in case of husband and wife, the petitioners, were of sufficient ability to bring up the child and furnish it with suitable nurture and education, and that it was fit and proper that such adoption should take effect, was authorized to decree that the child should be deemed and taken to be, to all legal intents and purposes, the child of the petitioner or petitioners;

and the child so adopted was thereafter to be deemed, for the purposes of inheritance and succession by such child, custody of his person, duty of obedience to such parents or parent by adoption, and all other legal consequences and incidents of the natural relation of parents and children, the same as if he had been born of such parents or parent by adoption in lawful wedlock, saving only that he should not be capable of taking property expressly limited to the heirs of the body of the petitioner or petitioners. St. 1851, c. 324, §§ 1-6. And by the St. of 1854, c. 24, the petitioner was authorized to have the name of the child changed at the same time. These provisions were substantially reenacted in 1860, and again in 1871, with a further exception that the adopted child should not be capable of taking property from the lineal or collateral kindred of such parents by the right of representation. Gen. Sts. c. 110, §§ 1-8, 13. St. 1871, c. 310.

The statute of Pennsylvania of 1855, which is made part of the case stated, and under which the demandant was adopted by the intestate in 1871, while both were domiciled in that State, corresponds to these statutes of this Commonwealth in most respects. Like them, it permits any inhabitant of the State to petition for leave to adopt a child; it requires the petition to be presented to a court in the county where the petitioner resides; it requires the consent of the parents or surviving parent of the child; it authorizes the court, upon being satisfied that it is fit and proper that such adoption should take effect, to decree that the child shall assume the name, and have all the rights and duties of a child and heir, of the adopting parent; and it makes the record of that decree evidence of that fact.

The statute of Pennsylvania differs from our own only in not requiring the consent of the petitioner's wife, and of the child if more than fourteen years of age; in omitting the words "as if born in lawful wedlock" in defining the effect of the adoption; in also omitting any exception to the adopted child's capacity of inheriting from the adopting parent; and in expressly providing that, if the adopting parent has other children, the adopted child shall share the inheritance with them in case of intestacy, and he and they shall inherit through each other as if all had been lawful children of the same parent.

In *Commonwealth v. Nancrede*, 32 Penn. St. 389, it was held that a child adopted under the act of 1855, and to whom the adopting father had devised and bequeathed all his estate, was not exempt from the collateral inheritance tax under an earlier statute of that State; and Chief Justice Lowrie said: "It is property devised or descending to children or lineal descendants that is exempt from the tax. If the heirs or devisees are so in fact, they are exempt; all others are subject to the tax. Giving an adopted son a right to inherit does not make him a son in fact. And he is so regarded in law, only to give the right to inherit, and not to change the collateral inheritance tax law. As against that law, he has no higher merit than collateral blood relations of the deceased, and is not at all to be regarded as a son in fact." The scope and meaning of that decision appear more clearly by referring to the terms of the earlier statute, which imposed such a tax on all estates passing from any person dying seised thereof, either testate or intestate, to any person other than the "father, mother, husband, wife, children and lineal descendants born in lawful wedlock." *Purd. Dig.* 214, 215. The whole effect of the decision therefore was, that a child adopted under the act of 1855 was not exempt from the tax, because he was not a "child born in lawful wedlock," or, in the words of the Chief Justice, not "a son in fact."

In *Schafer v. Eneu*, 54 Penn. St. 304, a testator, who died before the passage of the adoption act of 1855, devised property in trust for the sole and separate use of his daughter for life, and on her death to be conveyed to her children and the heirs of her children forever, and made a residuary devise to his own children, by name, in fee; the daughter afterwards adopted three children under the act of 1855, and died leaving no other children; and it was held that the estate devised went to the children of the testator, and not to the adopted children of the daughter. Mr. Justice Strong, in delivering judgment, referred to *Commonwealth v. Nancrede*, above cited, and said: "Adopted children are not children of the person by whom they have been adopted, and the act of Assembly does not attempt the impossibility of making them such." "The right to inherit from the adopting parent is made complete, but the identity of

the child is not changed. One adopted has the rights of a child without being a child." And he added that the testator's own children had a vested interest under his will, when the act of 1855 was passed, which it was not in the power of the Legislature to take away.

We are not required, and are hardly authorized, for the purposes of the present case, to consider whether the first of these decisions can be reconciled in principle with that of Vice Chancellor Stuart in *Skottowe v. Young*, L. R. 11 Eq. 474, above referred to, or the second with those of this court in *Sewall v. Roberts*, 115 Mass. 262, and *Loring v. Thorndike*, 5 Allen, 257. We assume them to establish conclusively that by the law of Pennsylvania a child adopted by a man under the act of 1855, not being a child born to him in wedlock, is not his child, within the terms of the collateral inheritance tax act of that State, nor within the meaning of the will of a third person, domiciled in that State, who died before adoption had any legal existence there.

But the opinion in each of those cases clearly recognizes, what is indeed expressly enacted in the statute, that, as between the adopted child and the adopting father, the child has all the rights and duties of a child, and the capacity to inherit as such. According to one of the most learned and thoughtful writers on jurisprudence of our time, it is the rights, duties and capacities, arising from the event which creates a particular status, that constitute the status itself and afford the best definition of it. 2 Austin on Jurisprudence (3d ed.) 706, 709-712, 974. By the law of Pennsylvania, therefore, as enacted by its Legislature and expounded by its highest judicial tribunal, the demandant, as between him and his adopting father, has in all respects the legal status of a child.

The law of the domicile of the parties is generally the rule which governs the creation of the status of a child by adoption. *Foster v. Waterman*, 124 Mass. 592. 4 Phillimore, § 531. Whart. Conf. § 251. The status of the demandant, as adopted child of the intestate, in the State in which both were domiciled at the time of the adoption, was acquired in substantially the same manner, and was precisely the same so far as concerned his relation to, and his capacity to inherit the estate of, the

adopting father, as that which he might have acquired in this Commonwealth, had the parties been then domiciled here. In this respect, there is no conflict between the laws of the two Commonwealths. The difference between them in regard to the consent of the wife of the adopting father, and to the inheritance of estates limited to heirs of the body, or inheritance from the kindred, or through the children, of such father, are not material to this case, in which the only question is whether the adopted child or a brother of the adopting father has the better title to land in the absolute ownership of such father at the time of his death. Whatever effect the want of formal consent, on the part of the wife of the intestate, to the adoption of the demandant, might have, if she were claiming any interest in her husband's estate, it can have no bearing upon this controversy between the adopted child and a collateral heir.

The tenant in his argument laid much stress on the words of the statute of descents and of the statutes of adoption of this Commonwealth.

The statute of descents which was in force at the time of the death of the intestate in 1873 enacts that when a person dies intestate, seised of any real estate, it shall descend, subject to his debts, and saving rights of homestead, "in the manner following: First. In equal shares to his children, and to the issue of any deceased child by right of representation; and if there is no child of the intestate living at his death, then to all his other lineal descendants," &c. "Second. If he leaves no issue, then to his father. Third. If he leaves no issue nor father, then in equal shares to his mother, brothers and sisters," &c. "Eighth. If the intestate leaves a widow and no kindred, his estate shall descend to his widow; and if the intestate is a married woman and leaves no kindred, her estate shall descend to her husband. Ninth. If the intestate leaves no kindred, and no widow or husband, his or her estate shall escheat to the Commonwealth." Gen. Sts. c. 91, § 1. See also St. 1876, c. 220.

But this section must be understood as merely laying down general rules of inheritance, and not as completely and accurately defining how the status is to be created which gives the capacity to inherit. It does not undertake to prescribe who shall be considered a child, or a widow, or a husband, or what is

necessary to constitute the legal relation of husband and wife, or of parent and child. Those requisites must be sought elsewhere. The words "children" and "child," for instance, in the first clause, "issue," in the phrase "if he leaves no issue," in subsequent clauses, and "kindred," in the last two clauses of this section, clearly include a child made legitimate by the marriage of its parents and acknowledgment by the father after its birth under § 4 of the same chapter, or a child adopted under the provisions of c. 110 of the General Statutes, or c. 310 of the Statutes of 1871.

These statutes, after providing how a child may be adopted in this Commonwealth with the sanction of a decree of the Probate Court in the county in which the adopting parent resides, (or, under the St. of 1871, in the county where the child resides, if the adopting parent is not an inhabitant of this Commonwealth,) enact that a child "so adopted" shall be deemed, for the purpose of inheritance, and other legal consequences of the natural relation of parent and child, to be the child of the parent by adoption. St. 1851, c. 324, § 6. Gen. Sts. c. 110, § 7. St. 1871, c. 310, § 8. It is argued that the words "so adopted" imply that children otherwise adopted are incapable of inheriting lands in this Commonwealth. But it appears to us that these words, in the connection in which they stand, warrant no such implication; and that the Legislature, throughout these statutes, had solely in view adoption by or of inhabitants of this Commonwealth, and did not intend either to regulate the manner, or to define the effects, of adoption by and of inhabitants of other States according to the law of their domicil.

We are not aware of any case, in England or America, in which a change of status in the country of the domicil, with the formalities prescribed by its laws, has not been allowed full effect, as to the capacity thereby created of succeeding to and inheriting property, real as well as personal, in any other country the laws of which allow a like change of status in a like manner with a like effect under like circumstances.

We are therefore of opinion that the legal status of child of the intestate, once acquired by the demandant under a statute and by a judicial decree of the State of Pennsylvania, while the parties were domiciled there, continued after their removal into

this Commonwealth, and that by virtue thereof the demandant is entitled to maintain this action.

It is worthy of mention (although it cannot of course affect the rights of inheritance which had absolutely vested on the death of the intestate; *Tirrell v. Bacon*, 3 Fed. Rep. 62) that by a recent statute of this Commonwealth "any inhabitant of any other State, adopted as a child in accordance with the laws thereof, shall, upon proof of such fact, be entitled in this Commonwealth to the same rights, as regards succession to property, as he would have enjoyed in the State where such act of adoption was executed, except in so far as they conflict with the provisions of this act." St. 1876, c. 213, § 11.

Judgment for the demandant.

HENRY C. HOLDEN vs. FITCHBURG RAILROAD COMPANY.

Worcester. Oct. 1, 1878. — Sept. 16, 1880. AMES & SOULE, JJ., absent.

The rule of law, that a servant cannot maintain an action against his master for an injury caused by the fault or negligence of a fellow-servant, is not confined to the case of two servants working in company, or having opportunity to control or influence the conduct of each other, but extends to every case in which the two, deriving their authority and their compensation from the same source, are engaged in the same business, though in different departments of duty; and it makes no difference that the servant whose negligence causes the injury is a submanager or foreman, of higher grade or greater authority than the plaintiff.

If a master uses reasonable care in employing suitable servants, in supplying and keeping in repair suitable structures and engines, and in giving proper directions and taking due precautions as to their use, he is not responsible to one servant for the negligence of another in the management and use of such structures and engines in carrying on the master's work.

A railroad corporation is not liable to a brakeman on one of its trains for injuries suffered from the negligent setting up and use of a derrick by workmen employed in widening its railroad.

A master, whether a natural person or a corporation, is bound to use reasonable care in selecting his servants, and in keeping the engines with which, and the buildings, places and structures in, upon or over which, his business is carried on, in a fit and safe condition, and is liable to any of his servants for injuries suffered by them by reason of his negligence in this respect.

If a railroad corporation suffers a derrick, not actually in use for the purposes of its business, to remain for an unreasonable length of time, on land within its

control, in such a position by the side of its track as to be in danger of being thrown down by ordinary natural causes so as to interfere with the safe passage of its trains, the corporation is liable to a brakeman for injuries resulting from its own neglect in not removing the derrick, or in not guarding against the danger of allowing it to remain, even if it was put up by other servants of the corporation, and independently of the question of their negligence.

TORT for personal injuries sustained by the plaintiff while in the employ of the defendant corporation as a brakeman.

At the trial in the Superior Court at November term 1877, before *Wilkinson, J.*, the plaintiff offered to prove the following facts :

Prior to June 1876, a public street in Fitchburg had crossed the defendant's railroad by a bridge resting on stone abutments, the railroad at that point passing through a deep cut. In June 1876, upon the petition of the defendant and others, the city council of Fitchburg discontinued a part of this street, including the part which crossed the railroad, and also laid out and extended another public street on the southerly side of the railroad as a substitute for the discontinued portion of the old street. This action of the city council was taken upon an agreement with the defendant that the latter would do all the necessary work in constructing the extended street, and effecting the discontinuance of the old street, and would pay all damages caused by the extending and discontinuance. In pursuance of this agreement, the defendant employed workmen, and proceeded to execute the work, some of which was within and some without the located limits of the railroad. The object of the defendant was to widen its railroad at and near the crossing, and to lay additional tracks.

At the time of the plaintiff's injury the defendant was engaged in widening its railroad at a point where it was crossed by the old street in Fitchburg, for the purpose of laying additional tracks. In the execution of the work, the defendant's workmen had occasion to use a derrick owned and furnished to them by the defendant, for the purpose of removing the abutments of the bridge, and for building a supporting wall to the newly extended street, and for building other walls partly within and partly without the located limits of the railroad. At the time of the injury, a portion of the abutments of the bridge had been removed, leaving the bank, consisting of earth and stones,

on the north side of the track, and in plain view thereof, overhanging and projecting, and of a height of about seventeen feet. Several days before the accident, the workmen, in pursuance of the work, had set up the derrick on the north side of the track about on a level therewith, within four or five feet of the overhanging bank and within the located limits of the railroad. One guy was stretched across the track to the south side and there fastened, being of sufficient height when the derrick was upright to clear the passing trains. The other guys were fastened on the north side. The derrick was carelessly and negligently set up, the guys not being taut, and it was placed dangerously near the overhanging bank. The plaintiff did not contend that the derrick was not suitable for the work for which it was designed.

The day before the injury was warm, and the bank thawed, and it was obvious to any one who looked at it that a large mass of the bank was loosened, and liable to fall upon the derrick. The derrick had remained in the manner and position above described for a fortnight or more, and for ten days at least before the injury had not been used. The weather had been alternately thawing and freezing during that time. On December 15, 1876, a short time before the train on which the plaintiff was at work came along, a great mass of the bank broke off and fell on to the derrick, breaking it and knocking it down, and bringing the guy stretching across the railroad down in such a position that, when the train came along, it tore off the smoke-stack of the engine and swept over the tops of the cars, striking the plaintiff and causing the injury complained of.

The defendant employed a road-master who had charge of that portion and other portions of the railroad, and the general charge and supervision of the repairs and maintenance of the road-bed and tracks; but he had no charge of the work of altering this street, or removing these stone abutments, or digging for the additional tracks, and the men who were doing that work were not under his control. Within ten days before the injury, he passed over the railroad frequently, and knew or had reasonable cause to know the situation of the bank and derrick.

The defendant contended that, if these facts were proved, there was no evidence of negligence on its part; and that the negligence, if any, was that of fellow-servants of the plaintiff. The judge reported the case, by consent of the parties, before verdict, for the determination of this court. If, upon the above offer of proof, the plaintiff was entitled to go to the jury, the case was to stand for trial; otherwise, judgment was to be entered for the defendant.

F. P. Goulding, for the plaintiff.

G. A. Torrey, (*T. K. Ware* with him,) for the defendant.

GRAY, C. J. It is well settled in this Commonwealth, and in Great Britain, that the rule of law, that a servant cannot maintain an action against his master for an injury caused by the fault or negligence of a fellow-servant, is not confined to the case of two servants working in company, or having opportunity to control or influence the conduct of each other, but extends to every case in which the two, deriving their authority and their compensation from the same source, are engaged in the same business, though in different departments of duty. *Farwell v. Boston & Worcester Railroad*, 4 Met. 49. *Bartonshill Coal Co. v. Reid*, 3 Macq. 266. *Morgan v. Vale of Neath Railway*, 5 B. & S. 570, 736, and L. R. 1 Q. B. 149. *Wilson v. Merry*, L. R. 1 H. L. Sc. 326.

In *Farwell v. Boston & Worcester Railroad*, which has long been considered, both in this country and in England, the leading case upon the subject, Chief Justice Shaw, in delivering the judgment of the court, said: "The general rule, resulting from considerations as well of justice as of policy, is, that he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and, in legal presumption, the compensation is adjusted accordingly. And we are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment. These are perils which the servant is as likely to know, and against which he can as effectually guard, as the master. They are perils incident to the service, and which can be as distinctly foreseen and provided for in the rate of compensation

as any others." 4 Met. 57. "The master, in the case supposed, is not exempt from liability because the servant has better means of providing for his safety when he is employed in immediate connection with those from whose negligence he might suffer; but because the implied contract of the master does not extend to indemnify the servant against the negligence of any one but himself; and he is not liable in tort, as for the negligence of his servant, because the person suffering does not stand towards him in the relation of a stranger, but is one whose rights are regulated by contract, express or implied. The exemption of the master, therefore, from liability for the negligence of a fellow-servant does not depend exclusively upon the consideration that the servant has better means to provide for his own safety, but upon other grounds. Hence the separation of the employment into different departments cannot create that liability, when it does not arise from express or implied contract, or from a responsibility created by law to third persons and strangers for the negligence of a servant." 4 Met. 60, 61.

In that case, the business of a railroad corporation, within the meaning of the rule, was defined to be "to construct and maintain a railroad, and to employ their trains of cars to carry persons and merchandise for hire;" 4 Met. 55; and it was held, that a railroad corporation was not liable to the driver of the locomotive engine of a passenger train for an injury sustained in consequence of the negligence of a switchman in the management of a switch. Upon the same principle, it has been held by this court, that an apprentice acting as fireman of a locomotive engine is a fellow-servant with those employed to construct switches on the tracks of the railroad; *King v. Boston & Worcester Railroad*, 9 Cush. 112; that a laborer employed to repair the road-bed, or a carpenter employed to repair bridges and fences and to do like work on the line of the railroad, is a fellow-servant with those in charge of the train by which he was being carried to his place of labor; *Gillshannon v. Stony Brook Railroad*, 10 Cush. 228; *Seaver v. Boston & Maine Railroad*, 14 Gray, 466; and that a carpenter employed in the repair shop, and being so carried, is a fellow-servant with a flagman or switchman. *Gilman v. Eastern Railroad*, 10 Allen, 233, and 13 Allen, 433. The rule has been steadfastly upheld by the English courts under

similar circumstances. *Hutchinson v. York, Newcastle & Berwick Railway*, 5 Exch. 848. *Waller v. Southeastern Railway*, 2 H. & C. 102. *Morgan v. Vale of Neath Railway*, above cited. *Tunney v. Midland Railway*, L. R. 1 C. P. 291. See also *Lovell v. Howell*, 1 C. P. D. 161; *Charles v. Taylor*, 8 C. P. D. 492. And it makes no difference that the servant whose negligence causes the injury is a submanager or foreman, of higher grade or greater authority than the plaintiff. *Albro v. Agawam Canal*, 6 Cush. 75. *Zeigler v. Day*, 123 Mass. 152. *Walker v. Boston & Maine Railroad*, 128 Mass. 8. *Gallagher v. Piper*, 16 C. B. (N. S.) 669. *Feltham v. England*, L. R. 2 Q. B. 33. *Wilson v. Merry*, above cited. *Howells v. Landore Steel Co.* L. R. 10 Q. B. 62.

Nothing was decided in *Ford v. Fitchburg Railroad*, 110 Mass. 240, inconsistent with this view. The meaning of the statement on page 260, "The agents who are charged with the duty of supplying safe machinery are not, in the true sense of the rule relied on, to be regarded as fellow-servants of those who are engaged in operating it," is explained by the sentence that immediately follows, "They are charged with the master's duty to his servant." The decision in that case was, that if a railroad corporation, acting by its proper officers and agents, did not use due care in keeping a locomotive engine in repair, the driver of the engine might maintain an action against the corporation for personal injuries caused by the defective condition of the engine; and that there was no error in a refusal to instruct the jury that the corporation was not liable, unless the plaintiff proved that the president, directors or superintendent either personally knew, or by the exercise of reasonable care in the performance of their duties might have known, that the engine was defective, or that the persons employed to have the charge of it and keep it in repair were incompetent; because, as was said in the opinion, "the question was not whether the officers named knew, or might have known, of the defect, or of the incompetency of those who had charge of the repairs, but whether the corporation in any part of its organization, by any of its agents, or for want of agents, failed to exercise due care to prevent injury to the plaintiff from defects in the instrument furnished for his use." 110 Mass. 261.

If a master uses reasonable care in employing suitable servants, in supplying and keeping in repair suitable structures and engines, and in giving proper directions and taking due precautions as to their use, he is not responsible to one servant for the negligence of another in the management and use of such structures and engines in carrying on the master's work. The decisions of this court furnish illustrations of this application of the rule under a great variety of circumstances. *Albro v. Agawam Canal*, above cited. *Durgin v. Munson*, 9 Allen, 396. *Duffy v. Upton*, 113 Mass. 544. *Avilla v. Nash*, 117 Mass. 318. *Hodgkins v. Eastern Railroad*, 119 Mass. 419. *O'Connor v. Roberts*, 120 Mass. 227. *Kelley v. Norcross*, 121 Mass. 508. *Harkins v. Standard Sugar Refinery*, 122 Mass. 400. *Zeigler v. Day*, 123 Mass. 152. *Colton v. Richards*, 123 Mass. 484. *Smith v. Lowell Manuf. Co.* 124 Mass. 114. *Morse v. Glendon Co.* 125 Mass. 282. *Kelley v. Boston Lead Co.* 128 Mass. 456. See also *Tarrant v. Webb*, 18 C. B. 797; *Hall v. Johnson*, 3 H. & C. 589; *Wilson v. Merry*, above cited.

The reasons and the limits of the rule, so applied, are clearly brought out in the judgments delivered in the House of Lords in *Wilson v. Merry*. In that case, the defendants, who were coal and iron masters, had used due care in selecting the sub-manager of a coal pit, and had furnished him with all necessary implements and resources for working the pit, and there was no defect in the general system of ventilation; the submanager, in order to open a seam of coal, built a scaffold which obstructed the circulation of air beneath, and caused an accumulation of fire-damp, which exploded and injured a workman in the mine; and for this injury the action was brought.

Lord Chancellor Cairns stated the reason of the general rule substantially in the same way as Chief Justice Shaw had done in 4 Met. 60, above cited, and said: "The master is not, and cannot be, liable to his servant, unless there be negligence on the part of the master in that in which he, the master, has contracted or undertaken with his servant to do. The master has not contracted or undertaken to execute in person the work connected with his business." "But what the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and

competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this, he has, in my opinion, done all that he is bound to do. And, if the persons so selected are guilty of negligence, this is not the negligence of the master." L. R. 1 H. L. Sc. 332.

Lord Cranworth said: "In order effectually to carry on the work, it was necessary that a scaffolding should be fixed under the superintendence of an underground manager, and when so fixed it was necessary that workmen should be employed at it in excavating the mine under similar superintendence." "If, indeed, the owners had failed to take reasonable care in causing the scaffold to be erected, the case would have been different, but of this there is no evidence. It certainly was not incumbent on them personally to fix the scaffold. They discharged their duty when they procured the services of a competent underground manager." L. R. 1 H. L. Sc. 334, 335.

Lord Chelmsford pointed out the distinction between that "system of ventilation and putting the mine into a safe and proper condition for working," which "it was the duty of the master for whose benefit the work is being carried on to provide," and the system of what might be called "local ventilation," which it became necessary to arrange in the course of working the pit, and which must be considered as part of the mining operations; and observed that, even if the accident happened in consequence of the scaffold in the particular seam having, under the submanager's orders, been so constructed as to obstruct the necessary ventilation, it would have been the result of negligence in the course of working the mine, and one of the risks incident to the employment. L. R. 1 H. L. Sc. 336, 337.

Lord Colonsay said: "I think that there are duties incumbent on masters with reference to the safety of laborers in mines and factories, on the fulfilment of which the laborers are entitled to rely, and for the failure in which the master may be responsible. A total neglect to provide any system of ventilation for the mine may be of that character. Culpable negligence in supervision, if the master takes the supervision on himself;—or, where he devolves it on others, the heedless selection of unskilful or incompetent persons for the duty, — or the failure to provide, or

supply the means of providing, proper machinery or materials;—may furnish grounds of liability; and there may be other duties, varying according to the nature of the employment, wherein, if the master fails, he may be responsible.” But he was of opinion that the direction of the judge under which a verdict had been returned against the defendants was objectionable, because it apparently dealt with the alleged defect in the scaffold as if it was a defect in the general arrangement or system of ventilation of the pit, for which in certain views the defendants might be regarded as liable; whereas it was a defect in the construction of a temporary structure erected by order of the submanager for certain working operations, whereby the free action of a good system of ventilation was temporarily interfered with, which raised a totally different question for the consideration of the jury in reference to the liability of the defendants for the fault of the submanager; and this was one of the grounds on which a new trial was ordered. L. R. 1 H. L. Sc. 344–346.

In *Farwell v. Boston & Worcester Railroad*, Chief Justice Shaw said: “We are far from undertaking to say that there are no implied warranties and undertakings arising out of the relation of master and servant. Whether, for instance, the employer would be responsible to an engineer for a loss arising from a defective or ill-constructed steam-engine: Whether this would depend upon an implied warranty of its goodness and sufficiency, or upon the fact of wilful misconduct or gross negligence on the part of the employer, if a natural person, or of the superintendent or immediate representative and managing agent, in case of an incorporated company—are questions on which we give no opinion.” 4 Met. 62.

By subsequent decisions it has been settled that the master, whether a natural person or a corporation, is bound to use reasonable care in selecting his servants, and in keeping the engines with which, and the buildings, places and structures in, upon or over which, his business is carried on, in a fit and safe condition, and is liable to any of his servants for injuries suffered by them by reason of his negligence in this respect. *Cayzer v. Taylor*, 10 Gray, 274. *Snow v. Housatonic Railroad*, 8 Allen, 441. *Gilman v. Eastern Railroad*, above cited. *Coombs v. New Bedford Cordage Co.* 102 Mass. 572. *Huddleston v. Lowell Machine Shop*,

106 Mass. 282. The master does not warrant the safety or sufficiency of such places, buildings, structures or engines. *Ladd v. New Bedford Railroad*, 119 Mass. 412. But he is bound to use reasonable care, having regard to the nature of the business and the circumstances of the case, to secure their safety and sufficiency.

It is difficult, if not impossible, to lay down a more definite rule applicable to all cases. As to switches or turn-tables upon the line of a railroad, the employment of suitable persons to select, construct or inspect has been held to satisfy the obligation of the corporation. *King v. Boston & Worcester Railroad*, Suffolk, November Term 1851; *S. C.* 9 Cush. 112.* *Sammon v. New York & Harlem Railroad*, 62 N. Y. 251. *Potts v. Port Carlisle Dock & Railway*, 2 L. T. (N. S.) 283. On the other hand,

* That was an action against a railroad corporation by an apprentice employed in its machine shop, and acting at the time, without additional compensation, as fireman of a locomotive engine, for an injury caused by the breaking of a switch at the junction of the Brookline Branch with the main track of the defendant's railroad. The report in 9 Cush. 112-115 states that the full court held that "the case distinctly shows that there was no want of ordinary care and diligence on the part of the defendants;" but omits to state that part of the case which related to this point, and which in the judge's report on file is as follows: "To prove the nature of the defect in the switch and the cause of the accident, the plaintiff called as a witness Benjamin Wallace, who testified as follows: I was employed as second foreman in the machine shop of the defendants. Mr. Woodworth was foreman. The joint of the switch-rod, which broke at the time of the accident, was made at the shop of Mr. Wilmarth in South Boston. It was sent there to be made, because our machine shop was so full of work at the time that we could not make it. After the work was done at Wilmarth's, it was sent to our shop; and to complete it, ready for the switch, I put into the centre an iron rod six feet long. This was the switch-rod of the Brookline Branch. I cannot say Mr. Woodworth saw or inspected it. All I did to it was to put in the connecting centre-piece. It was part of my business to attend to switches at the crossing of the Tremont Road. When I put in the connecting centre-piece, I looked at the joint which afterwards broke, and thought it was sufficiently safe. It was a new patent switch-rod, got up by Mr. Parker, the superintendent of the railroad; it was intended to move four tracks, and moving the switch operated on the joint; but there was nothing peculiar in the joint, it was like all switch-rod joints, the novelty consisting in the length of the rod and the number of tracks it moved, but not in the joint itself."

where a locomotive engine in actual use is imperfectly constructed, or is worn out, it has been held that the fact that the corporation has employed suitable persons to construct it or to keep it in repair does not, as matter of law, afford a conclusive defence; but that the question is whether, under all the circumstances, the corporation, acting by its appropriate officers or agents, has used that diligence and taken those precautions which its duty as a master requires. *Ford v. Fitchburg Railroad*, 110 Mass. 240. *Hough v. Railway Co.* 100 U. S. 213. See also *Searle v. Lindsay*, 11 C. B. (N. S.) 429; *Allen v. New Gas Co.* 1 Ex. D. 251; *Murphy v. Phillips*, 35 L. T. (N. S.) 477.

If a railroad corporation has suffered a structure, not actually in use for the purposes of its business, to remain for an unreasonable length of time, on land within its control, in such a position by the side of its track as to be in danger of being thrown down by ordinary natural causes so as to interfere with the safe passage of its trains, the structure is in law a nuisance, and the corporation is liable to servants employed upon its passing trains, as well as to other persons, for injuries resulting from its own neglect in not removing the structure, or in not guarding against the danger of allowing it to remain in such a place, whether it was originally put there by other servants of the corporation or by strangers, and independently of the question of negligence on the part of those who placed it there.

In the case at bar, the workmen employed in widening the railroad were fellow-servants of the brakemen on the trains; and it being admitted that the derrick was suitable for the work for which it was designed, and there being no evidence of negligence on the part of the corporation in selecting or instructing the workmen, any negligence of theirs in setting up or using the derrick is the negligence of fellow-servants of the plaintiff, for which the defendants cannot be held liable in this action.

But the evidence at the trial tended to show that the derrick had remained unused by the side of the track, dangerously near an overhanging bank of earth and stones, in plain view, and with a guy loosely stretched across the track (though at a sufficient height when the derrick was upright to clear the passing trains) for at least ten days while the weather was alternately

freezing and thawing; that on the day preceding the night on which the plaintiff was injured the bank thawed, and it was apparent to any one who looked at it that a large mass of the bank was loosened and ready to fall upon the derrick; and that, just before the freight train on which the plaintiff was at work came along, such a mass broke off from the bank, and fell upon the derrick, knocking it down and bringing the guy stretched across the track into such a position that it swept over the top of the train and struck the plaintiff, causing the injury sued for. This evidence would warrant a jury in finding that the defendant corporation had not used the care which the circumstances required to keep the track in a safe condition, and to guard against the impending danger.

Case to stand for trial.

WILLIAM DICKINSON vs. CENTRAL NATIONAL BANK.

Worcester. Oct. 2, 1879. — Sept. 16, 1880. ENDICOTT & LORD, JJ., absent.

The owner of shares of stock in a national banking association delivered his certificate of stock, together with a power of attorney to transfer the same, to secure his promissory note; and, more than four months afterwards, became a bankrupt, and an assignee in bankruptcy was appointed. Subsequently, the note being due and unpaid, the payee, after notice to the bankrupt and his assignee, sold the stock by public auction, under the Gen. Sts. c. 151, § 9. The assignee subsequently demanded of the bank a transfer of the stock to himself, but the bank refused, and afterwards transferred the stock to the purchaser at the sale. The by-laws of the bank provided that its stock should be assignable only on its books, subject to the restrictions and provisions of the U. S. Rev. Sts. § 5139, and a transfer book should be kept, in which all assignments and transfers of stock should be made; and that when stock was transferred, the certificates thereof should be returned to the bank and cancelled, and new certificates issued. *Held*, that the assignee could not maintain an action against the bank for the conversion of the stock. *Held, also*, that evidence that it was agreed, at the time of the original delivery of the certificate and power of attorney, to keep the transaction secret, in order that the transferor, who was a director of the bank, might obtain a false credit at the bank, was inadmissible, in the absence of proof that the bank had knowledge or notice of such agreement.

TORT by the assignee in bankruptcy of Lucius W. Pond against a bank organized under the laws of the United States,

for the conversion of ten shares of its capital stock. Trial in the Superior Court, without a jury, before *Allen, J.*, who allowed a bill of exceptions, in substance as follows:

On April 13, 1866, Pond became owner of the ten shares; and the bank issued to him a certificate on that day which contained the clause that the shares were "transferable only on the books of the bank by the said Pond or his attorney, on the surrender of this certificate."

On April 11, 1871, Pond signed and delivered a promissory note to the firm of A. G. Coes & Co. for \$1500, payable on demand, with interest, at the rate of ten per cent per annum, payable semiannually. At the same time he delivered to the firm, as collateral security for the note, the certificate above mentioned, and executed on a separate paper a power of attorney, authorizing the firm to transfer the ten shares of stock to any person, and to make and execute the necessary acts of assignment.

On October 22, 1875, Pond became a bankrupt, and on November 10 of the same year the plaintiff was appointed his assignee.

Interest was paid on the note to April 11, 1875; and on December 18 of that year John H. Coes, the surviving partner of the firm, the note being due and unpaid, served a notice on Pond and the plaintiff, which, after reciting the debt and the collateral security, stated that the shares of stock would be sold by public auction on February 21, 1876. This notice and an affidavit of its service were recorded in the city clerk's office in Worcester, where all the parties lived.

On February 15, 1876, the plaintiff, as assignee of Pond, demanded of the defendant a transfer of the shares to himself; but the defendant refused to make the transfer; and on July 19, 1877, transferred the shares on the books of the bank to one Lovell, who purchased the shares at the sale made by Coes on February 21, 1876, Lovell giving the bank a bond of indemnity.

The by-laws of the bank relating to the transfers of stock were as follows:

"The stock of this bank shall be assignable only on the books of this bank, subject to the restrictions and provisions of the act, and a transfer book shall be kept, in which all assignments and transfers of stock shall be made. Transfers of stock shall

not be suspended preparatory to a declaration of dividends, and, except in cases of agreement to the contrary expressed in the assignments, dividends shall be paid to the stockholders, in whose name the stock shall stand on the day on which the dividends are declared."

"The form of certificates of stock shall be prescribed by the directors, and shall be signed by the president and cashier, and shall state upon the face thereof that the stock is transferable only upon the books of the bank, and when stock is transferred the certificates thereof shall be returned to the bank and cancelled, and new certificates issued."

The plaintiff also offered to show, that, from April 13, 1866, down to the time of his bankruptcy, Pond acted as a director of the defendant bank; that Coes & Co. and Pond, at the time of the delivery of the certificate and of the execution of the power of attorney, agreed to keep the same a secret, and agreed that the stock should not be transferred, in order that Pond might obtain a false credit by being the ostensible owner of the stock, and by remaining a director of the bank, and might thereby be enabled to induce the defendant to discount his notes, and other persons to give him credit; and that he did thereby obtain a credit which induced many persons, whose claims have been proved in bankruptcy, to trust him for the debts so proved. It was not contended that substantially all the creditors of Pond knew of his apparent ownership of this stock, and of his acting as director.

The judge excluded the evidence offered; and found for the defendant. The plaintiff alleged exceptions.

G. F. Hoar & R. Hoar, for the plaintiff.

F. T. Blackmer, for the defendant.

COLT, J. It was decided in *Fisher v. Essex Bank*, 5 Gray, 373, that the shares in a bank whose charter provides that they shall "be transferable only at its banking-house and on its books," cannot be effectually transferred, as against a creditor of the vendor, who attaches them without notice of any transfer, by a delivery of the certificates thereof together with an assignment and blank power of attorney from the vendor to the vendee, even if notice of such transfer be given to the bank before the attachment. The express provision of the charter

regulating the mode of transfer was declared to have the force of a general provision of law binding on the corporation and its stockholders, and on all other persons.

But it was decided in *Sargent v. Essex Marine Railway*, 9 Pick. 201, that an assignment of shares by deed, accompanied by delivery of the certificates to the purchaser, was valid between the parties, and against attaching creditors, although the by-laws of the corporation required that all transfers should be made in the treasurer's books. The provisions of the by-laws were declared to be "an arrangement of the corporation for their own convenience, and is so far binding upon purchasers that they cannot compel any payment of dividends, or insist upon certificates, without applying to have a transfer made conformably to the by-laws." In the absence of any rule to be found in the general laws, or in some express provision of the charter, determining what shall constitute an actual transfer of shares in a corporation, the rules which govern the transfer of similar property at common law must be applied.

The laws of the United States, under which all national banking associations are organized, declare that "the capital stock of each association shall be divided into shares of one hundred dollars each, and be deemed personal property, and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association." U. S. Rev. Sts. § 5139. It is contended by the plaintiff that this clearly prohibits a transfer of shares except on the books of the corporation; while the defendant insists that the provision was intended only to give to the corporation the usual power to regulate, by its own by-laws, the manner of keeping a record of the transfers of its own stock upon its own books, as a means of protection in the matter of making dividends, conducting elections of officers, and other corporate proceedings; and that it does not forbid a transfer of title in other legal modes.

It is not necessary now to decide this question. It is enough in the present case for the bank to show that the new certificate for Pond's stock was issued to one who had become the owner of the shares by a title good against Pond's assignee in bankruptcy. As between Pond and Coes & Co., the delivery of the certificate, as collateral security for a debt due the latter, with

a power of attorney to transfer the shares and execute an assignment of them to any other person, conferred a power coupled with an interest, and gave to any one claiming under an execution of the power a right to demand of the bank a certificate of the stock.

The subsequent bankruptcy of Pond did not operate to vest in the plaintiff, as his assignee, a right to the shares in question, as against Coes & Co., or give him a right to prohibit the bank, upon the surrender of the old certificate, from issuing a new certificate to the person to whom they were transferred under the power of attorney. The delivery of the stock as security for a debt, with the execution of the power of attorney, gave to Coes & Co. a power coupled with an interest, which was not revoked by the bankruptcy of Pond, and could only be revoked by the payment of the debt. *Hunt v. Rousmanier*, 8 Wheat. 174. Story on Agency, §§ 477, 482. The assignee under the bankrupt act, except as to property conveyed for the purpose of defrauding creditors, and in violation of the provisions of the act, took no greater right in property than the bankrupt had at the time of filing his petition. U. S. Rev. Sts. §§ 5044, 5046. He took such estate only as the bankrupt had a beneficial as well as legal interest in, and which he was required to apply to the payment of the debt. *Dugan v. Nichols*, 125 Mass. 43. *Kenney v. Ingalls*, 126 Mass. 488. *Donaldson v. Farwell*, 93 U. S. 631.

The provision making void conveyances by the bankrupt in fraud of creditors does not apply to conveyances in preference of creditors made more than four months before proceedings in bankruptcy. *Coggeshall v. Potter*, 1 Holmes C. C. 75. The only right which the plaintiff as assignee took in these shares was the right to redeem them by paying the debt which they were pledged to secure, and that right was foreclosed by sale of the same at public auction after notice. Gen. Sts. c. 151, § 9.

The offer of the plaintiff to prove that Coes & Co. agreed to keep secret the delivery of the certificate and the execution of the power to them, in order that Pond might obtain a false credit at the bank, was properly excluded. For even if a court of equity would refuse relief to any party to such an agreement, that consideration does not establish the right to maintain this

action to recover damages against the bank. It is not shown that the bank had any knowledge or notice of such a corrupt agreement, and, without such knowledge, the defendant cannot be charged with a conversion of the property, because it has delivered a new certificate to one who had an apparently good title.

Exceptions overruled.

GEORGE H. DUNBAR *vs.* WILLIAM T. SOULE.

Bristol. Oct. 30, 1879. — Sept. 13, 1880. COLT & AMES, JJ., absent.

A testator bequeathed a sum of money in trust for the establishment of a school in a city, and appointed certain persons named and the "mayor of the city" a board of trustees to carry into effect the provisions of the will. A codicil provided that the fund was to be paid over to the city for educational purposes, if two thirds of the trustees should be of opinion that they could not administer it as the testator intended. *Held*, that, while the trustees held the fund, the city took no interest in it; and that the person who was the "mayor of the city" at the time of the testator's death, and not the mayor at the time the trustees were appointed, was entitled to be appointed a trustee.

APPEAL by William T. Soule from a decree of the Probate Court, appointing George H. Dunbar one of the trustees under the will of William W. Swain. The record showed the following facts:

The testator, by his will, which was duly proved and allowed on November 5, 1858, gave a certain estate in trust for the establishment of a free school in New Bedford for girls ten years of age and upwards, and appointed ten persons by name "and the mayor of the city" a board of trustees to carry into effect the provisions of the will in relation to the proposed school. By a codicil, executed a year after the will, the testator provided that the fund was to be paid over to the city for educational purposes, if two thirds of the trustees should be of opinion that they could not administer it as the testator intended. Five of the persons named as trustees have since died; and one declined the trust. On January 23, 1879, the four remaining persons named presented a petition to the Probate Court, setting forth the above facts, and praying that

they might be appointed such trustees. On February 4, 1879, George H. Dunbar, presented a petition, representing that he was the "mayor of the city" of New Bedford at the time of the testator's death, and praying that he might be appointed one of the trustees. On the same day, William T. Soule, presented a petition, representing that, at the date thereof, he was the "mayor of the city" of New Bedford, and praying that he might be appointed one of the trustees. On March 4, 1879, the Probate Court appointed the four petitioners named in the will and Dunbar such trustees; and Soule appealed from the decree, filing the following reason of appeal: "Because by the true intent and meaning of said will the 'mayor of the city' therein named is the mayor ex officio, or in his official capacity."

Hearing before *Lord, J.*, who affirmed the decree of the Probate Court; and the appellant appealed to the full court.

F. A. Milliken, for the appellant.

C. W. Clifford, for the appellee.

ENDICOTT, J. There is nothing in this will to indicate that the testator intended that the city of New Bedford should take any interest in the fund given to the trustees for the establishment of a school; or that the city, in its corporate capacity, should have any control or direction in its management. The provisions in the codicil, executed a year after the will, authorizing the fund to be paid over to the city for educational purposes, if two thirds of the trustees should be of opinion that they could not administer it as the testator intended, does not in any way change the character of the trust, or the duties of the trustees while they hold it.

Nor is there anything to indicate that the "mayor of the city," who is named one of the trustees, was to execute the trust conferred upon him in his official capacity; or that the testator intended that he should bear a different relation to the board of trustees from that of his co-trustees, or that his rights, duties or tenure of office should differ from theirs. It is the common case of a gift to a person by an official designation, which leaves no doubt as to his identity. A devise or legacy need not be to a person by name in order to render it valid and certain; it is sufficient if it may be made certain, as where a

gift is to the eldest son of A. So a gift in trust to the Chancellor of the State of New York, the mayor and recorder of the City of New York, and several other persons by their official description only, was held to be a good devise in fee to the persons holding those offices; although the devise, after naming the Chancellor and the other officials, contained this clause, "for the time being and their respective successors in said offices forever." *Inglis v. Sailor's Snug Harbor*, 3 Pet. 99. Mr. Justice Story differed from the conclusion of the majority of the court, and was of opinion that, from the language used by the testator, it appeared that he intended a devise to them, as officers during their continuance in office, and to their successors in office forever; but he concurred with the majority in the general proposition, that the Chancellor, mayor, recorder and other officers might take as individuals, if such was clearly the intention of the testator.

In this case, there are no words added to the mere official designation. The person who was the mayor of the city of New Bedford at the death of the testator was, therefore, entitled to be appointed trustee. *Decree affirmed, with costs.*



BENJAMIN E. HOYT vs. EMILY A. JAKES & another.

Essex. Nov. 5, 1879. — Sept. 7, 1880. COLT & AMES, JJ., absent.

A devise of so much of the testator's estate as may be sufficient for the maintenance of the devisee during his life, "he having full power to sell and convey any and all of my real estate, at any time, if necessary to secure such maintenance," does not give to the devisee the right to mortgage the estate in fee.

WRIT of entry, against Emily A. Jakes and John Harriman, to foreclose a mortgage of land in Haverhill. Plea, *nul disseisin*. Trial in the Superior Court, without a jury, before Pitman, J., who ruled, as matter of law, that the tenants were entitled to judgment, and reported the case for the determination of this court. If the ruling was incorrect, the case was to stand for trial; otherwise, judgment to be entered for the tenants. The facts appear in the opinion.

W. H. Moody, for the demandant.

J. P. Jones, for the tenants.

MORTON, J. The demandant claims title to the demanded premises under a mortgage to him made by John Harriman. The premises were formerly the separate estate of Mary Anne Harriman, the wife of John. She died leaving a will, of which the second clause is as follows: "I give, devise and bequeath to my said husband and executor so much of any and all my estate, whether real or personal, of which I may die seised or possessed, as may be sufficient for his comfortable maintenance and support for and during the term of his natural life, he having full power to sell and convey any and all of my real estate, at any time, if necessary to secure such maintenance." The third clause gives the rest and residue of her estate to her daughter, Emily A. Jaques, one of the tenants. The husband of the testatrix did not, before her death, give his written assent to the will or its provisions; and the tenants contend that it was invalid, so far as it affected John Harriman's right as tenant by the curtesy. But the want of such assent did not render the will wholly void. *Burroughs v. Nutting*, 105 Mass. 228. And we have not deemed it necessary to consider whether the acts of the husband after her death, in proving the will and accepting its provisions in his favor, were or were not a waiver of his rights as tenant by the curtesy and an election to take under the will, because it is not material to the decision of this case. If, after the death of his wife, the only interest of Harriman was a tenancy by the curtesy, he was divested of that interest by the levy of the execution against him in favor of Eben S. Flint and others, his judgment creditors. The levy and set-off to said judgment creditors having been made before the mortgage to the demandant, it would follow that the demandant took nothing by his mortgage. If, on the other hand, Harriman took under the will, it is clear that, upon the true construction of the second clause, he did not take any greater estate in the premises than a life estate, with a power to sell the whole or any part, if it was necessary to secure to him a comfortable maintenance and support. *Gibbins v. Shepard*, 125 Mass. 541. *Paine v. Barnes*, 100 Mass. 470.

The question then arises whether this power to sell for the purpose of support includes a power to make a mortgage in

fee. In the ordinary case of a power "to sell and convey" land, given by a principal to his attorney, it is clear that the attorney would not be authorized to mortgage the land. *Wood v. Goodridge*, 6 Cush. 117. The two transactions of a sale and a mortgage are essentially different. A power to sell implies that the attorney is to receive for the benefit of the principal a fair and adequate price for the land; a power to mortgage involves a right in the attorney to convey the land for a less sum, so that the whole estate may be taken on a foreclosure for only a part of its value. So, under a will, a trust with a power to sell *prima facie* imports a power to sell "out and out," and will not authorize a mortgage, unless there is something in the will to show that a mortgage was within the intention of the testator. 2 Perry on Trusts, § 768.

It has been held that, where the sole object and purpose of the testator in conferring the power was to pay debts or a particular specific charge upon the estate, and the estate itself is devised subject to that charge, such power to sell may authorize a mortgage; but where it appears from the will that the intention of the testator was to sell the estate and convert it absolutely, a mortgage by the donee of the power is void. *Ball v. Harris*, 4 Myl. & Cr. 264. *Stroughill v. Anstey*, 1 DeG., M. & G. 635. *Haldenby v. Spofforth*, 1 Beav. 890. *Page v. Cooper*, 16 Beav. 896. *Devaynes v. Robinson*, 24 Beav. 86. *Bloomer v. Waldron*, 8 Hill, 361.

In the case at bar, the power given to the life tenant is "to sell and convey any and all of my real estate, at any time, if necessary to secure such maintenance." This language does not in its terms import a power to mortgage; and we find in the will no decisive indications that the testatrix intended to use it in any other than its natural and obvious meaning. Thus used, it gives the husband the power to sell and convey for a fair price any or all of the real estate, if necessary for his comfortable support, but it does not give the right to mortgage the estate for a part only of its value. The intention appears from her language to have been that her husband, if it became necessary for his support, might sell the real estate and convert it "out and out," and not that he might at his discretion charge it with incumbrances and liens.

Upon the whole case, therefore, we are of opinion that, whether John Harriman took as a tenant by the curtesy or under the will, the demandant's mortgage deed conveyed nothing to him; and that the ruling was correct. *Judgment for the tenants.*

ALBERT D. SWAN vs. BENJAMIN L. EMERSON.

Essex. Nov. 7, 1878. — Sept. 8, 1880. ENDICOTT & LORD, JJ., absent.

A purchaser of land, under a power of sale contained in a mortgage, who, after he has taken possession of the land, pays a tax, assessed upon the land to a subsequent mortgagee while the latter was in possession under his mortgage, cannot maintain an action against the subsequent mortgagee to recover the amount of the tax so paid.

CONTRACT for money paid. Writ dated May 31, 1876. The case was submitted to the Superior Court upon the following agreed facts:

One Woodbury, being the owner of a parcel of land in Lawrence, made a first mortgage thereof on May 16, 1872, to one Bartlett, a second mortgage thereof on May 23, 1872, to one Moore, and a third mortgage thereof on June 14, 1872, to the defendant. Each of these mortgages contained the usual power of sale with liberty to the mortgagee to purchase at the sale, and was duly recorded.

On October 28, 1872, the defendant entered on the land for breach of condition, and, under the power in his mortgage, sold and conveyed the land to one Knox, who was acting as his agent, and who on the next day reconveyed the land to him by quitclaim deed, without any real consideration. The city of Lawrence on May 1, 1873, and on May 1, 1874, duly assessed to the defendant the taxes upon this land, and, in August in each of those years, committed one of these taxes to the collector of taxes, who, within a month afterwards, demanded payment thereof of the defendant, but the defendant has never paid any part of these taxes.

On January 28, 1875, Moore, for breach of condition of his mortgage and under the power therein contained, sold and

conveyed the land, for a sum less than the amount due under that and the first mortgage, to the plaintiff, who was then ignorant of the fact that the taxes aforesaid remained unpaid, and has since remained in possession, and on February 8, 1875, upon the demand of the collector of taxes, and to prevent an advertisement, expenses and sale of the land under the lien for the taxes aforesaid, and to protect his title, paid the amount of those taxes to the collector. No part of the principal sums secured by the first and second mortgages has ever been paid.

If the plaintiff was entitled to recover the sums so paid for taxes, judgment was to be entered for him; otherwise, for the defendant. The Superior Court gave judgment for the plaintiff for the sums paid and interest; and the defendant appealed to this court.

E. T. Burley, for the plaintiff.

S. B. Ives, Jr., for the defendant.

GRAY, C. J. It is not necessary in this case to decide whether, under the existing statutes, a tax assessed on real estate can be collected by distraint of goods, or arrest of the body, or action against the person taxed. See *Rev. Sts. c. 8, §§ 3, 7, 11, 15, 19; Crapo v. Stetson*, 8 Met. 393; *Snow v. Clark*, 9 Gray, 190; *Gen. Sts. c. 12, §§ 3, 7, 13, 19*.

No arrest of the body can be made in any case, unless "a person refuses or neglects for fourteen days after demand to pay his tax, and the collector cannot find sufficient goods upon which it may be levied." *Gen. Sts. c. 12, § 13*. And no action of contract can be maintained against the person taxed, as for his own debt, unless he "neglects to pay his tax for one year after it is committed to the collector." § 19. But a tax on real estate constitutes a lien and incumbrance thereon from the day as of which it is assessed, and may be levied by sale thereof at any time within two years after it is committed to the collector, "if the tax is not paid within fourteen days after a demand of payment made either upon the person taxed or upon any person occupying the estate," without regard to the question whether sufficient goods can be found on which to levy it, or whether a year has expired since the committing of the tax to the collector. §§ 8, 22. *Cochran v. Guild*, 106 Mass. 29. *Hill v. Bacon*, 110 Mass. 387. *Davis v. Bean*, 114 Mass. 358.

The liability of real estate for the payment of a tax assessed thereon is not, therefore, secondary or collateral to any personal liability of the person to whom the tax is assessed.

The taxes paid by the plaintiff, not being primarily a debt of the defendant, secured by a lien on the land, but being primarily a charge upon the land itself, the defendant is under no implied obligation to repay to the plaintiff the amount paid by him to relieve the land from that charge. The plaintiff has no greater right of action against the defendant than any purchaser of land by a quitclaim deed, containing no covenant against incumbrances, has against his grantor for the amount of taxes previously assessed thereon to the grantor and afterwards paid by the grantee.

The case differs from one in which money is paid by the plaintiff to discharge what is primarily a debt of the defendant, secured by a lien on the land, as in *Hale v. Huse*, 10 Gray, 99, and in *Nichols v. Bucknam*, 117 Mass. 488; or in which the plaintiff has been obliged to pay damages for a defect in a way or bridge, for which the defendant is primarily responsible, as in *Baker v. Greenhill*, 3 Q. B. 148, and in *Swansey v. Chace*, 16 Gray, 308; or in which the plaintiff has been compelled to pay rent which the defendant is primarily liable to pay, as in *Exall v. Partridge*, 8 T. R. 308, and in *Carter v. Carter*, 5 Bing. 406; *S. C.* 2 Moore & Payne, 732. See also *Farrington v. Kimball*, 126 Mass. 313.

The Gen. Sts. c. 12, §§ 39-41, do not aid the plaintiff. By those sections, a mortgagee taking possession of land under his mortgage is liable to pay the taxes due thereon, and is authorized to pay them to the collector, and to add the sum so paid to the amount of his mortgage, as against the owner of the equity or a subsequent mortgagee, in case of redemption by either of them; but he has no more right to bring a personal action against either of them for the sum so paid, than for the principal sum remaining due on his own mortgage. And the title under which this plaintiff took possession was acquired by sale under the power in the second mortgage, and was not the title of the mortgagee, but the title of the mortgagor. *Hall v. Bliss*, 118 Mass. 554.

Judgment for the defendant.

ISAAC P. CLAPP & another vs. ISRAEL HERRICK.

Essex. Nov. 6, 1878. — Sept. 9, 1880. ENDICOTT & LORD, JJ., absent

The owner of a mill on a natural stream, who withholds or lets down water in excessive quantities, beyond what is incident to the necessary or reasonable use of his mill, is liable in an action of tort for injuries thereby caused to lands below on the same stream.

In an action against the owner of a mill on a natural stream, for injuries sustained by the owner of lands below on the same stream, evidence of a former judgment in an action by the plaintiff against the grantor of the defendant for a similar injury is admissible; and parol evidence is admissible to show what was in controversy in that action.

In an action against the owner of a mill on a natural stream for injuries sustained by the owner of lands below on the same stream, in consequence of the mill-owner putting in a new wheel, the plaintiff may show what the condition of his land was before the new wheel was put in.

TORT for unlawfully and injuriously holding back and letting down water upon and flowing the plaintiffs' land. Writ dated February 10, 1875. Trial in the Superior Court, before *Brigham*, C. J., who allowed a bill of exceptions in substance as follows:

The plaintiffs offered evidence of their title to the land described in the declaration; and it was admitted that, for three years prior to the date of the writ, the defendant had been in the occupation of a mill-dam and a saw-mill across a stream called Pye Brook, situated above the land of the plaintiffs. The defendant bought this mill, from the administrator of the estate of William Lowe, by deed dated December 6, 1871. The plaintiffs offered evidence tending to show that it was an old mill, and, until within twenty years, had never been used between April 15 and October 15 in each year, and also offered in evidence a judgment obtained by one of the plaintiffs against said administrator, by which it appeared that in 1867 Isaac P. Clapp brought an action of tort against William Lowe for injury done to the plaintiff's meadow land by the unlawful discharge of water from the defendant's mill-dam, which it was alleged was unlawfully maintained on July 10, 1867; that, after the death of Lowe, his administrator appeared; and judgment by consent was entered for the plaintiff, which judgment was satisfied.

It was admitted that, in 1867, William Lowe took out of the mill the wheel which had been in use for some time before, and put into the mill the present wheel and gate, and there was evidence on the part of the defendant, the fact not being admitted by the plaintiffs, tending to show that the new wheel used only about one eighth as much water as the former one. Isaac P. Clapp was permitted, against the objection of the defendant, to testify that the action in which the judgment was obtained was brought by him for damage to him after the use of the new wheel, and which was caused by it. The plaintiffs also offered evidence tending to show that the defendant used his mill during 1872, 1873, and 1874, until the middle of July, and in August and September, and claimed to maintain their action on the ground that the defendant had used said mill-stream during the summer months, and also in an unnecessary and unreasonable manner, and thereby overflowed and injured their land. The plaintiffs were also permitted to show the condition of their land in 1865. To the admission of all the foregoing testimony, except that as to the relative use of water by the two wheels, the defendant objected.

The defendant asked the judge to instruct the jury as follows: "1. In this form of action, the plaintiffs can only recover damages for some abuse by the defendant of a right to use his mill during the season when the damage is alleged to have been done; such as wantonly or unnecessarily letting down water upon the plaintiffs. But it is not of itself wantonness or an abuse of a right to use his mill if the defendant saws, using a reasonable quantity of water therefor when the plaintiffs are getting their hay. 2. Whether or not the defendant has the right to keep up his dam and maintain a head of water during the summer and use his mill, the jury are not to consider. In this action they must assume that he has such right."

The defendant also objected to the submission of the case to the jury, except upon the issue of damage arising from an abuse by the defendant of a right to use his mill at all seasons of the year, contending that for other damages the plaintiffs' remedy was by complaint under the Gen. Sts. c. 149.

The judge instructed the jury as follows: "The defendant became on December 6, 1871, owner of land through which a

natural watercourse, called Pye Brook, flowed, and on which was situated a saw-mill. By virtue of his deed the defendant acquired the right, as owner of that land, inseparably connected with and incident to that ownership, at all times of the year, to the natural flow of that watercourse through his land, and its descent, and all the mechanical force which could be derived from it, for any hydraulic purpose to which he might deem fit to apply it.

"The defendant was bound to use such watercourse reasonably as it passed through his land, so as not to injure the equal right which the plaintiffs had to the like reasonable use of the same watercourse. The maintenance of a dam, and the use of water in driving mill-wheels, must necessarily and incidentally damage its steady and constant natural flow, and substitute a different manner of that flow as to the time of holding water up and letting it down. So far as such mode is reasonably incidental to the use of the stream for mill purposes, it is the right of the proprietor, and constitutes in part the mill-privilege which the law gives him; and if such reasonable use interferes with the use of the water which another riparian proprietor might have made of it, the latter has no cause of action on account of such interference.

"The defendant had no right to divert the waters of Pye Brook, so that they could not flow naturally through the plaintiffs' land, or to hold them back for unreasonable lengths of time, or to let them down in unreasonable quantities; but the defendant cannot be held responsible for any injurious consequences which resulted to the plaintiffs, if the defendant used the water in a reasonable manner, and the water used by him was limited by and did not exceed what was reasonably and necessarily required for the operation of his saw-mill, if that mill was adapted and appropriate to the size and capacity of the brook and the quantity of water usually flowing therein. What would be a reasonable use of a watercourse must depend upon all the circumstances of the character of the stream, its capacity, sources of supply, its relative position, the usages of the country in relation to mills on similar streams, and the exigencies of business at his mill. The defendant, having a right to make such reasonable use of Pye Brook at all seasons of the year, was not responsible for

an injury which was the necessary and unavoidable result of his exercise of that right. The use made of Pye Brook by William Lowe, from whom the defendant purchased his mill and mill-site, in connection with that mill and mill-site, would not, however many years exercised, restrict or control the defendant's use of the same, nor would the usage of Lowe and of those from whom he derived his title to that mill and mill-site, for any number of years, to use the same in winter only and never during the summer months, authorize the finding that there was a lost record of proceedings under the mill acts, which in law restricted Lowe, and the defendant as his grantee, to a use of such mill and mill-site in the winter months only, and not in the summer months; nor was the judgment obtained by the plaintiff against William Lowe, if it was for damages suffered by the plaintiff by Lowe's use of said mill, substantially as used by the defendant in the summer months, conclusive evidence of the defendant's right to use said mill in the summer months, or that such use was unreasonable as affecting the plaintiffs' rights in the brook. That judgment, as evidence considered in and of itself, is evidence that Lowe used his mill wrongfully prior to the action in which that judgment was obtained, to the plaintiffs' injury, and such judgment so considered was equally consistent with Lowe's having a right to use said mill during the summer months; or with his having the right to use said mill during all the months of the year, or with his unreasonable exercise of a right to use his mill either in the summer or winter months. Such judgment may be considered by the jury as evidence, in connection with all the circumstances and considerations which induced the administrator of Lowe's estate to consent to its being entered."

The jury returned a verdict for the plaintiffs; and the defendant alleged exceptions.

W. A. Herrick, for the defendant.

S. B. Ives, Jr., for the plaintiffs.

GRAY, C. J. The rulings and instructions at the trial were sufficiently favorable to the defendant.

1. The owner of a mill on a natural stream, who withholds or lets down the water in excessive quantities, beyond what is incident to the necessary or reasonable use and operation of his mill, is not protected by the mill acts, but is liable to an action

of tort at common law for injuries thereby caused to lands below on the same stream; and the instructions given to the jury did not allow the plaintiff to recover damages on any other ground. *Gile v. Stevens*, 13 Gray, 146, 149. *Gould v. Boston Duck Co.* 13 Gray, 442. *Thompson v. Moore*, 2 Allen, 350. *Brigham v. Wheeler*, 12 Allen, 89.

2. The judgment recovered in the former action against Lowe for a similar injury was rightly admitted in evidence. Considered in and of itself, it was, as the jury were instructed, only evidence that Lowe, from whom the defendant derived his title, used his mill wrongfully, to the plaintiffs' injury. The testimony of the plaintiff, that that action was brought for damage suffered after the new wheel was put in, and caused by it, was competent for the purpose of showing that the question actually tried and determined in the former action was the same which was in controversy in this.

3. The evidence of the condition of the plaintiffs' land, before the new mill-wheel was put in, was admissible upon the question of the effect upon the land of the use of this wheel.

Exceptions overruled.

SAMUEL F. HILL vs. JAMES WRIGHT.

Essex. Nov. 7, 1879. — Sept. 13, 1880. COLT & AMES, JJ., absent.

The St. of 1862, c. 198, making the husband of a married woman, who does business on her separate account, liable on her contracts, if no certificate is filed as therein required, does not apply to a husband domiciled in another State, whose wife does business on her separate account in this Commonwealth.

CONTRACT for goods sold and delivered to the defendant's wife. The case was referred to an auditor, who found the following facts:

The defendant's wife commenced the business of keeping a boarding-house in Lawrence on September 29, 1871, and continued in that business until October 8, 1872, on her own separate account, with the knowledge of her husband, who knew she was trading on credit with the plaintiff. The goods bought of

the plaintiff were sometimes ordered by the defendant's wife, and sometimes by her son and daughter, who lived with and assisted her in the business; and the goods so ordered were charged on a pass-book to the defendant's wife. On October 8, 1872, she sold out the business to her daughter, who, some time in 1873, sold the business to her brother, without any written bill of sale; and he, on April 4, 1877, conveyed back the business to his said sister. The defendant's wife remained at the house where the business was carried on about half the time from October 8, 1872, to May 26, 1877, spending the rest of the time with her husband in the State of Maine, where he resided.

The plaintiff contended that these conveyances from Mrs. Wright to the daughter, from the daughter to the son, and from the son back to the daughter again, were only colorable and intended as a fraud upon creditors; but the auditor did not so find.

The plaintiff was not notified of the change, and continued to deliver and charge goods to the defendant's wife under such circumstances as to make her liable up to May 26, 1877.

The defendant never has been a resident of this Commonwealth, but during the whole time covered by these transactions was a resident of the State of Maine, although he made frequent visits to Lawrence; and he was not in fact carrying on the business himself. No certificate was filed by the defendant or his wife under the St. of 1862, c. 198.

Upon these facts, the auditor ruled that the plaintiff could not maintain his action.

The case was submitted to the Superior Court upon the findings of the auditor; and *Bacon, J.* ruled, as matter of law, that the action could not be maintained, and ordered judgment for the defendant. The plaintiff alleged exceptions.

J. C. Sanborn, for the plaintiff.

J. Cleaveland, for the defendant.

LORD, J. In deciding this case, we are to assume all the facts to be found necessary to show that this defendant, during all the time while his wife was doing business in this Commonwealth, was domiciled within the State of Maine; and that the wife came from another State, without her husband, he never

having lived with her in this State, and that there was no fraud or collusion between the husband and wife in reference to the transaction of the business here. Although, upon a careful scrutiny of the auditor's report, we may find evidence tending to show a different state of facts, and might hesitate to come to the same conclusion; yet we are bound to assume as true all the conclusions of fact found by the auditor, and all inferences of fact which the presiding judge was authorized to draw from such findings, and we cannot say, as matter of law, that he drew any wrong conclusion.

It is quite clear, upon an examination of the St. of 1862, c. 198, that its primary purpose, at all events, was to define the rights and duties of husbands and wives living together in this Commonwealth, the wife doing business upon her separate account, and that it has no application to a husband who is domiciled in another State, and whose wife comes into this State and trades upon her own account. It is to be understood, from the finding of the auditor, that the husband, notwithstanding his visits to this State, the purpose and objects of which are not disclosed, was during the whole time in good faith resident of and domiciled in another State. The nature of the business of the wife was not such that in his absence it might be presumed to be his business, and it is affirmatively found that it was not his business. It was not, therefore, a debt contracted by the wife which at the common law he would be obliged to pay. It was neither necessities nor apparel nor ornament according to her degree and station in life, nor does it appear that he had ever refused to supply her with whatever was suited to her rank and condition in life.

Statutes concerning the liability of husbands upon the contracts of their wives will not be construed as extending to husbands in good faith domiciled without the State, though their wives may come into the State and subject themselves to the duties and liabilities imposed by law, unless it is clearly apparent by the words of the statute that it was intended to apply to such husbands; and if such intention is clearly manifested by the statute, it must be determined by the particular circumstances of each case, as it arises, whether the statute can operate so far extraterritorially as to bind one not residing within the

limits of this State, and who has never authorized or ratified the dealings in relation to which he is sought to be charged.

In this case, there being nothing to show that the statute was intended to create a liability in a husband not domiciled within the State, the ruling of the court below that the statute did not apply was correct.

Exceptions overruled.

MOSES E. EMERSON vs. PAUL D. PATCH, executor.

Essex. Nov. 7, 1878. — Sept. 14, 1880. ENDICOTT & LORD, JJ., absent.

Where an auditor's report in favor of one party states particular facts from which a conclusion in favor of either party may be inferred, the jury, from those facts, without other evidence, may give a verdict against the conclusion of the auditor.

CONTRACT on an account annexed for wood sold and delivered to Charles Dustin, the defendant's testator. After the former trial, reported 123 Mass. 541, the case was tried in the Superior Court, before *Brigham*, C. J., and the plaintiff put in evidence the report of an auditor in his favor, and rested his case.

The report of the auditor stated the following facts: The plaintiff sold the wood, charged in the account annexed, to Edward Foye, who was then engaged in manufacturing bricks for Dustin, under a written agreement, by the terms of which Dustin agreed to furnish all necessary materials for making the bricks, except the clay. The number of cords and the price were agreed upon by the plaintiff and Foye, and the wood was delivered at the brick-yard occupied by Foye, and was there used by him in burning the bricks made by him for Dustin under the agreement. Dustin, during the progress of making the bricks, was frequently at the brick-yard and observed what was being done, and, after the burning was finished, sold a part of the bricks; a part was sold by Foye, and the remainder, after the death of Dustin, was taken and sold by the defendant. At the time of the sale and delivery of the wood in question, the

plaintiff was not informed of the agreement between Dustin and Foye, and had no knowledge that Dustin or any other person had any interest or responsibility in or about the business except Foye, and his first information upon that subject was within one week before the commencement of this action, when he learned of the existence of the written agreement between Dustin and Foye. In the mean time, on November 12, 1874, Dustin and Foye made a settlement of their accounts, in which Dustin released and gave up to Foye certain promissory notes which he held against him, and Foye released to Dustin his claim for making the bricks, and also executed to Dustin a bill receipted, dated October 27, 1874, for the wood in question or the larger portion of it, and made a final adjustment of their account of the business of manufacturing the bricks. Upon these facts, the auditor found that the plaintiff was entitled to recover for the price of the wood so sold and delivered to Foye, and stated the account.

The defendant offered no evidence, but contended that the facts found and reported by the auditor did not justify his conclusion, and, upon this issue, claimed the right to go to the jury.

The judge ruled that the auditor's report, being the only evidence in the case, entitled the plaintiff to recover; and directed the jury to return a verdict for the plaintiff, without permitting the defendant's counsel to discuss the auditor's report and the facts therein stated, and whether those facts justified the auditor in his final conclusion and finding in favor of the plaintiff. The defendant alleged exceptions.

J. P. Jones, for the defendant.

S. B. Ives, Jr., for the plaintiff.

GRAY, C. J. An auditor's report is made by statute *prima facie*, not conclusive evidence. The final conclusion of the auditor in favor of either party is as subject to be rebutted or controlled in the opinion of the jury, or of the judge when the case is tried without a jury, by the evidence or the particular facts or findings stated in the auditor's report, as by other evidence introduced at the trial. Gen. Sts. c. 121, § 46. *Commonwealth v. Cambridge*, 4 Met. 35, 40. *Taunton Iron Co. v. Richmond*, 8 Met. 434, 436. *Bradford v. Stevens*, 10 Gray, 379.

Peru Co. v. Whipple Manuf. Co. 109 Mass. 464, 466. *Fair v. Manhattan Ins. Co.* 112 Mass. 320, 329, 330. *Holmes v. Hunt*, 122 Mass. 505. *Blackington v. Johnson*, 126 Mass. 21. *Hamilton v. Boston Port Society*, 126 Mass. 407.

The particular facts reported by the auditor in this case did not show, as matter of law, either that Foye was or that he was not the agent of Dustin, but left that essential fact to be inferred as matter of fact from the facts reported. The verdict at the first trial was set aside by this court solely because the presiding judge had ruled, as matter of law, that the plaintiff could not recover. *Emerson v. Patch*, 123 Mass. 541. The ruling at the second trial, that the plaintiff was entitled to recover, without permitting the defendant's counsel to argue to the jury, upon the auditor's report and the facts therein stated, whether those facts justified the auditor's final conclusion in favor of the plaintiff, was equally erroneous. The error at each trial consisted in withdrawing a question of fact from the consideration of the jury.

Exceptions sustained.



JAMES ROOSEVELT vs. MICHAEL DOHERTY.

Suffolk. Nov. 18, 1878. — Sept. 7, 1880. COLT & MORTON, JJ., absent.

If a factor, under an entire contract for a gross sum, sells goods, some of which belong to himself and some to his principal, the principal cannot maintain an action against the purchaser for the value of his goods.

CONTRACT to recover the price of plate glass sold and delivered to the defendant. Trial in the Superior Court, before *Pitman*, J., who directed a verdict for the defendant, and reported the case for the determination of this court. If the plaintiff could maintain the action, a new trial was to be ordered; otherwise, judgment on the verdict. The facts appear in the opinion.

R. Gray & H. W. Swift, for the plaintiff.

F. S. Hesseltine, for the defendant.

ENDICOTT, J. It appears from the report that the firm of Hills, Turner & Harmon were importers of and dealers in window and plate glass, and they made a contract in writing with the defendant to furnish the glass for a building, which he was about to erect in Boston, according to the specifications furnished by the architect, for the gross sum of \$688 in cash. The contract describes the quality and dimensions of the glass to be furnished, and the number of lights of each quality. Hills, Turner & Harmon were the selling agents for the plaintiff, in Boston, for plate glass, and the first four items of glass to be furnished, as specified in the contract, were plate glass, and belonged to the plaintiff, having been consigned to the firm for sale. The remainder of the glass was furnished by the firm. The defendant had no knowledge that any of the glass belonged to the plaintiff.

We can have no doubt that, as between the firm and the defendant, this was an entire contract; it was to furnish the glass for the building for a specified sum of money. There was no price named in the contract for the several kinds and qualities of glass to be furnished; and it is immaterial that the quality of the several kinds of glass to be furnished was specified. The consideration being entire, there could be no distinct apportionment of the consideration between the different qualities of glass furnished. There were not two contracts, one for plate glass, and the other for glass of different qualities, but one contract for all the glass thus furnished to the building. *Clark v. Baker*, 5 Met. 452. The firm could not recover for any portion of the glass, but only on the entire contract, by which all the glass passed to the defendant. And the question to be considered here is, whether the plaintiff, as an undisclosed principal, can maintain an action against the defendant to recover the value of the plate glass belonging to him, included in the entire contract. We are of opinion that he cannot.

It is too well settled to require the citation of many authorities, that an undisclosed principal, whose goods are sold by a factor, may sue the purchaser for the price; and where the contract of sale is in writing, and made in the name of the factor, he may bring an action upon it. A sale by his agent is a sale by him. *Lerned v. Johns*, 9 Allen, 419, and cases cited.

In the case at bar, it does not appear that any instructions were given by the plaintiff in regard to the price, manner, or terms of sale of his goods. The factors therefore had the right to sell in such manner as would best promote the interests of their principal; and it is to be presumed that the plaintiff understood that they would sell according to the usual course of dealing in Boston, when goods are consigned to a factor for sale. *Dwight v. Whitney*, 15 Pick. 179. That a factor may sell on credit, and take a note in his own name from the purchaser, and if he uses due diligence he is not responsible, in case of loss by reason of the purchaser's failure, was settled in an early case. A factor also may, and often does, sell the goods of different principals in one sale, and has authority to take a note for the whole sum from the purchaser, and may hold the note for the benefit of his principals. *Goodenow v. Tyler*, 7 Mass. 36. *Chesterfield Manuf. Co. v. Dehon*, 5 Pick. 7. *West Boylston Manuf. Co. v. Searle*, 15 Pick. 225. *Hapgood v. Batcheller*, 4 Met. 573. *Hamilton v. Cunningham*, 2 Brock. 350. *Corties v. Cumming*, 6 Cowen, 181. Beaves *Lex Merc.* (5th ed.) 45.

In *West Boylston Manuf. Co. v. Searle*, *ubi supra*, a factor sold the goods of two consignors in one sale, and took the note of the purchaser; and it was held that it operated as payment; that the factor had power to release it; and, although he afterwards indorsed it to one of the consignors, that no action could be maintained on the note by the indorsee; and the court said, "The factors having an unquestioned authority to take a negotiable note in their own name, and thereupon to cancel and discharge the simple contract debt, the note was rightly taken, and whether it was rightly held and retained by the factors as their own, or otherwise appropriated, was a question merely between them and their employers."

So a factor may sell his own goods with those of his principal, and take a note which includes the amount due for both, as in *Hapgood v. Batcheller*, 4 Met. 573. In that case it appears that the factors had sold goods of the plaintiff's and some of their own in one sale, and had taken a note from the purchaser which included the amount due for the plaintiff's goods and their own; and it was said by the court, that the sales by the defendant were made in the usual manner, and the terms of credit were

reasonable, and that the sales were at the risk of the principals. Accounts had been rendered to the plaintiff by the factors of the sale of the goods, a portion of the proceeds had been paid over, and the note in suit was given for the balance by the factors to the plaintiff. Before the note of the purchasers was due, they became insolvent, and it was held that, as a note for the balance of an account is only *prima facie* evidence of payment, the factors were not liable for so much of the note as included the debt of the insolvent purchaser. See also *Vail v. Durant*, 7 Allen, 408.

It is clear, therefore, that when a note is taken from a purchaser by a factor, for the sale of the goods of several consignors, or for the sale of the goods of one or more consignors and of the goods of the factor, one consignor cannot sue the purchaser for the value of his goods taken separately, although his goods were sold for a definite sum, capable of being ascertained, and which forms a distinct part of the consideration of the note. The note is payment for the whole, it is a contract which the factor had the right to make, and upon which alone the purchaser is liable. The principal is thus deprived of his direct remedy against the purchaser for the separate price of his goods.

In the case at bar, Hills, Turner & Harmon were importers of and dealers in glass, as well as selling agents for the plaintiff, and they could sell their own goods with those of the plaintiff, in the same manner as they could sell the goods of several principals together. Having authority to do this, and thus mingle the plaintiff's goods with their own, they may make an entire contract with the purchaser for the goods so mingled. And this contract being entire, the remedy, as against the purchaser, must be upon the contract itself. The character of the contract precludes the plaintiff from suing separately for the value of his glass, to the same extent as he would have been precluded if a note had been given by the defendant in payment for the goods sold to him under the written contract. And although an undisclosed principal may maintain an action in his own name against one who has purchased his goods through a factor, yet the purchaser is entitled to all the equities and defences he would have had if the action had been brought in the name of the factor, for the principal has permitted his factor

to act as the apparent principal in the transaction. *Huntington v. Knox*, 7 Cush. 371. *Barry v. Page*, 10 Gray, 398. *Locke v. Lewis*, 124 Mass. 1, 7, and cases cited.

No case has been cited, in the very elaborate argument for the plaintiff, in which such an action as this has been maintained; but it is argued that the plaintiff's position is sustained by the only two cases which bear upon this point. *Corlies v. Cumming*, 6 Cowen, 181. *West Boylston Manuf. Co. v. Searle*, 15 Pick. 225.

The case of *Corlies v. Cumming* is clearly distinguishable. There a factor sold cheese of one of his consignors on a credit of ninety days for a definite and distinct sum, and at the same time sold to the same purchaser cheese belonging to another consignor, and took from the purchaser a note payable to himself for both. As the note by the law of New York was not a payment, it was held that the factor had not made himself liable, for the principal might sue the purchaser for the price of his cheeses, which could be clearly ascertained, in the same manner as he might have done if no note had been taken.

A dictum of Chief Justice Shaw in *West Boylston Manuf. Co. v. Searle* is relied on by the plaintiff. "If," he says, "the principal is in a condition to declare on a contract for goods sold, treating the note as a nullity, or as a mere collateral security, not amounting to payment, he might probably recover in his own name." This, as a general proposition, may be correct, but as by our law a promissory note is *prima facie* payment, the principal cannot recover for goods sold, where such a note has been given in payment for his goods.

We are therefore of opinion that the presiding judge correctly ruled that the contract made by the defendant was an entire contract for a gross sum; and that the plaintiff had no right to sever the same and maintain an action in his own name, and subject the defendant to a separate suit for the value of the plate glass belonging to him and included in the contract of sale.

Judgment on the verdict.

ALBERT H. SKILTON vs. JAMES W. ROBERTS & another.

Suffolk. March 6, 1879. — Sept. 8, 1880. MORTON & ENDICOTT, JJ., absent.

If land is sold, under a power contained in a mortgage, subject to outstanding tax titles, the mortgagee is not entitled to deduct from the proceeds of the sale money subsequently paid by him to redeem such tax titles; and evidence that it was understood and agreed, prior to the sale, between the mortgagee and the auctioneer, that the amount of the outstanding tax titles was to be deducted from the bid of the agent of the mortgagee, to whom the land was sold, is inadmissible.

CONTRACT by the assignee in bankruptcy of George A. Foster, to recover the surplus of the money received upon a sale under a power contained in a mortgage, from Foster to the defendants, of land in Somerville, deducting the amount of the mortgage and the interest due thereon, and the expenses of sale.

At the trial in the Superior Court, before *Pitman*, J., the plaintiff offered in evidence the following:

1st. The mortgage, executed on July 13, 1875, containing full covenants of warranty and against incumbrances; a condition for the payment of \$6000 in two years from that date, with interest at the rate of eight per cent a year, and all taxes and assessments levied or assessed upon or on account of the premises; a power, in case of any breach of condition, to sell the premises by public auction, giving notice by publication in a newspaper three successive weeks, and to convey the same absolutely and in fee simple to the purchaser, "and, out of the money arising from such sale, to retain all sums then secured by this deed (whether then or thereafter payable) together with interest, and all costs and expenses, including all sums paid by said grantees or their assigns for insurance of the premises, paying the surplus, if any, to the said grantor or his assigns;" and an agreement that the grantees or their assigns might purchase at such sale.

2d. The defendants' affidavit of sale, dated September 12, 1877, setting forth the breach of condition; the notice, which described the mortgage and the land, and concluded thus: "The above-described premises will be sold subject to all taxes and betterments due to the city of Somerville. Terms of sale, \$500

cash at time of sale, balance in ten days thereafter;" and the sale by auction on September 11, and conveyance on September 12 to Edwin C. Dolliver for the sum of \$7800, being the highest sum bid at the sale.

3d. A statement of sale, made in a letter from the defendants to the plaintiff, charging the amount of the mortgage and interest, \$6843.66, the amount "paid William H. Ireland for back taxes, &c." \$972.35, and the sum paid the auctioneer for selling and expenses, \$41; crediting the sum obtained at the sale, \$7800; and thereby showing a balance due the mortgagees of \$57.01.

4th. The deed of conveyance, dated September 24, 1877, from the defendants to Dolliver, reciting the sale, and containing this clause: "The above-described premises are subject to all taxes and betterments due the city of Somerville."

It appeared, and was admitted, that on June 21, 1876, and June 13, 1877, the premises had been sold and conveyed to Ireland by the collector of taxes of the city of Somerville, for the non-payment of taxes assessed thereon on May 1 of 1874 and 1875 respectively; that the taxes for 1876 and 1877 were also due and unpaid; and that the defendants first knew of such sales for taxes just before the sale under the power in the mortgage, and after that sale had paid to Ireland, to redeem the premises from the sale for taxes, the sum of \$972.35, mentioned in their letter to the plaintiff. The right so to apply that sum was claimed by the defendants, and denied by the plaintiff, at the trial.

The auctioneer was called as a witness by the defendants, and testified as follows: "I read the printed notice, and then said that the mortgagees were ready to take another mortgage from the purchaser. I do not think anything was said as to title. Ten days were given to examine it. A gentleman present asked if there were any other incumbrances. I told him there were some outstanding tax titles. I laid stress that the sale was subject to all taxes due the city of Somerville. The plaintiff bid \$7750, the defendant James W. Roberts bid \$7800, and that was the highest bid, and I said 'sold' to Dolliver; that was the understanding."

There was also evidence tending to show that Dolliver was not present at the sale; that he had no interest therein; that he

paid nothing, and that his name was merely used as a conduit to pass title to the defendants, to whom a deed from Dolliver was thereupon made; and that the whole transaction was in substance a purchase by the defendants, and they actually received no money.

The defendants offered to show by previous conversations with the auctioneer, not at the time and place of sale, that it was understood between them that the bid of the defendants was to be in the name of Dolliver, but for their benefit, and that the amount of the outstanding tax titles referred to was to be deducted from their bid. The defendants also offered to show what the defendants understood and intended by their bid. The judge excluded these offers of proof; and the defendants excepted.

The defendants asked the judge to rule that, upon the foregoing evidence and facts, the plaintiff could not maintain his action. But the judge refused so to rule, and directed a verdict for the plaintiff, as a matter of law, for the amount claimed and interest, which was accordingly rendered; and, at the request of the defendants, the case was reported for the determination of this court.

If the exclusion of the evidence offered or the ruling and direction were erroneous, the verdict was to be set aside; otherwise, judgment to be entered thereon.

H. W. Bragg, for the defendants.

R. Lund & D. F. Crane, for the plaintiff.

GRAY, C. J. The only title which the defendants, under the power contained in the mortgage to them, had the right to advertise for sale, or to sell, was the title of the mortgagor. *Hall v. Bliss*, 118 Mass. 554. There is no evidence that Ireland, the owner of the paramount title under the sales for nonpayment of taxes, authorized the defendants or the auctioneer to sell that title also, or that the defendants or the auctioneer undertook to sell it. On the contrary, the auctioneer, when called as a witness for the defendants, testified that, at the time of the sale and before any bid was made, he said, in answer to an inquiry, that there were some outstanding tax titles. The evidence of previous conversations between the auctioneer and the defendants, not at the time and place of the sale, and of the private

understanding and intention of the defendants, not disclosed to the other bidders, was rightly excluded.

If the defendants, in order to protect their title under the mortgage, and before selling under the power, had bought up the title of Ireland under the tax sales, they would have had the right to add the sum so paid to the amount of the mortgage, and to apply the proceeds of the sale under the power to the payment of both. *Davis v. Bean*, 114 Mass. 360. *Williams v. Hilton*, 35 Maine, 547. *Brown v. Simons*, 44 N. H. 475. *Mix v. Hotchkiss*, 14 Conn. 32. But in that case the estate sold under the power would have been free of the incumbrance of the tax title.

So if the title put up and sold had been the entire estate, without deducting incumbrances, the sum bid would have been for the whole value of that estate, and if the defendants, out of that sum, had discharged the claim of Ireland, the plaintiff could not have maintained this action. *O'Connell v. Kelly*, 114 Mass. 97. *Alden v. Wilkins*, 117 Mass. 216. *Morton v. Hall*, 118 Mass. 511.

But by the course actually pursued, the defendants have obtained bids only for the value of the estate, subject to that incumbrance, and now undertake to pay it off out of that value, thus in effect charging the mortgagor twice over with the amount of the incumbrance. They must therefore account to the plaintiff for the surplus of the purchase money, deducting only the amount due on the mortgage and the costs and expenses of sale. *Appleton v. Bancroft*, 10 Met. 231. *Cook v. Basley*, 123 Mass. 396. *Hood v. Adams*, 124 Mass. 481.

Judgment on the verdict.

**MICHAEL HANLON vs. SOUTH BOSTON HORSE RAILROAD
COMPANY.**

Suffolk. Nov. 12, 1879. — Sept. 8, 1880. MORTON & SOULE, JJ., absent.

In an action against a street railway corporation, a declaration alleging that the plaintiff was injured by a car of the defendant being carelessly driven upon and over him, is not supported by proof that the plaintiff was injured by another car, not carelessly driven, in attempting to escape from a car which was carelessly driven.

In an action against a street railway corporation, for an injury caused by a car being carelessly driven upon and over the plaintiff, the fact that, at the time of the injury, the car was being driven at a rate of speed prohibited by a city ordinance, although evidence of negligence on the part of the corporation, is not conclusive evidence of such negligence.

COLT, J. The plaintiff in his declaration alleges that he was injured by a car of the defendant company, which was carelessly driven upon and over him. The case appears to have been tried upon this allegation. But in the closing argument, it was first contended in behalf of the plaintiff that, if a car on one of the double tracks of the defendant's railway was carelessly driven towards him, and to escape from it he ran upon the other track in front of another car, by which he was struck and injured, he could recover, although there was no negligence on the part of the driver of the last-named car. The judge properly refused to rule in accordance with this claim, on the ground that the point was not open to the plaintiff under his declaration. This refusal was notice at a proper stage of the case, and before it was committed to the jury, that the declaration must be amended if the plaintiff relied for a recovery on such a state of facts. No amendment, however, was asked for, and the case went to the jury upon the allegation that the plaintiff was struck by the car which was carelessly driven upon him, and not by another car, running in a different direction on another track. The defendant has a right to rely on the declaration as stating the true cause of the injury complained of, and evidence of an injury received in the way suggested would show a clear variance between the pleading and the proof. The averment of the declaration is not supported by proof that the plaintiff was injured by another car in attempting to escape

from a car carelessly driven. *Lund v. Tyngsboro*, 11 Cush. 563.

There was evidence that the car which struck the plaintiff was driven at a speed prohibited by an ordinance of the city. The judge was asked to rule that, "if the defendant was driving at a rate of speed prohibited by the ordinance of the city of Boston, and this speed contributed to the injury, this fact would itself constitute negligence on the part of the defendant, and would entitle the plaintiff to recover if he was in the exercise of due care." This was refused, and the jury were told that, if they were satisfied that the rate of speed exceeded that allowed by the city ordinance, such violation of the ordinance would be evidence, but not conclusive evidence, of negligence.

Upon the case as presented by this bill of exceptions, we cannot say that the plaintiff was entitled, as matter of law, to the instructions requested. It is for the excepting party to make it appear that he has been prejudiced. The mere fact that the car was driven at a rate of speed forbidden by the city ordinance would not be conclusive proof of negligence. The speed complained of, for all that appears, may have occurred without the fault of the driver, or may have been justified by some reasonable necessity authorizing the jury to find that there was no negligence or misconduct in the defendant's servants. It is not true that if an unlawful rate of speed contributed to the injury, that alone would give the plaintiff a right to recover, if he was without fault. The instructions given were sufficiently favorable to the plaintiff. See *Hall v. Ripley*, 119 Mass. 135; *Lane v. Atlantic Works*, 111 Mass. 136; *Wright v. Malden & Melrose Railroad*, 4 Allen, 283.

Exceptions overruled.

J. A. Maxwell, for the plaintiff.

J. G. Abbott, (*H. E. Bolles* with him,) for the defendant.

SYLVANUS STOCKWELL *vs.* SARAH A. BLAMEY.

Suffolk. November 17, 1879. — September 8, 1880.

A deed of land was executed by a man and his wife to a third person, who, at the same time and as part of the same transaction, executed a deed of reconveyance of the land to the wife. *Held*, that the declarations of this third person, made after the deeds were executed, but before they were delivered, to the effect that the deeds were executed because the husband and wife feared that the land would be attached by a creditor of the husband, were inadmissible in a writ of entry against the wife by this creditor, to whom the land was subsequently sold on execution.

COLT, J. The two parcels of land demanded in this writ of entry were sold on execution as the property of Nicholas T. Blamey, and conveyed by sheriff's deed to the demandant. A few days before the land was attached, Blamey and his wife had conveyed the same in two deeds to Harding, who, at the same time and as part of the same transaction, conveyed the same to Mrs. Blamey, the tenant in this action. It was contended by the demandant that these conveyances of the land from Blamey to his wife, through the intervention of Harding, were fraudulent as to his creditors.

At the time of the transfer, the two deeds drawn up by Harding, who was a real estate broker, were signed by Blamey and his wife and taken by Harding to a magistrate, who returned with him to Blamey's residence, where they were acknowledged and delivered.

The demandant offered to prove declarations of Harding, while he was on his way with the magistrate to obtain the acknowledgment of the grantors, and before the deeds were delivered, the substance of which was, that the deeds were being made and executed because of apprehensions on the part of the Blameys that the property would be taken to satisfy a debt due the demandant. The judge excluded this evidence, on the ground that the deeds had not been delivered at the time the declarations were made; and it is clear that, as admissions in disparagement of title, the evidence was not competent. The declarations of a former owner to qualify or disparage his title are only admissible when made while the title

is in him. They cannot be allowed to affect a title which is subsequently acquired. *Noyes v. Morrill*, 108 Mass. 396.

Nor were the declarations offered competent upon the issue presented for the purpose of showing a fraudulent intent on the part of Blamey and his wife. There was no sufficient foundation laid for their introduction. Apart from the declarations themselves, there is nothing to show that Harding was not an innocent agent employed only to transfer the title from Blamey to his wife without any knowledge of their fraudulent intent. He does not appear to have paid any consideration for the deed to himself, or to have received any from his grantee. He had only an instantaneous seisin, with no actual possession of the premises. The jury would not be justified in finding that he was a participator in the alleged fraud, or that he was more than a mere conduit of title. Under such circumstances, his declarations as to the apprehensions and purposes of the Blameys were hearsay. They were not admissible as characterizing any act done by him. They related to the conduct and intentions of other parties; and their weight as evidence depends entirely on the credit of Harding, and not on their connection with any fact in issue. They do not come within the rule which makes the declarations of one of several parties acting in concert admissible, because there was no evidence that Harding was jointly interested in the alleged fraud of the Blameys. *Haynes v. Rutter*, 24 Pick. 242. *Pool v. Bridges*, 4 Pick. 377. *Lund v. Tyngsborough*, 9 Cush. 36. *Exceptions overruled.*

A. Russ & R. Lund, for the demandant.

N. C. Berry, for the tenant.

S. A. PIERCE *vs.* JOHN B. O'BRIEN.

Suffolk. November 21, 1879. — September 8, 1880.

A voluntary assignment by a debtor in another State of all his property situated in this Commonwealth, in trust for his creditors, the only consideration for which is the acceptance of the trust by the assignee, although valid in the State where made, is invalid as against a subsequent attachment of his personal property by a creditor in this Commonwealth not assenting to the assignment; and a subsequent assent to the assignment by creditors in the other State, by proving their claims under it, cannot defeat the title acquired by the attachment here.

COLT, J. This is an action of tort for the conversion of personal property, attached in this State by a Massachusetts creditor as the property of a resident of Rhode Island. By the laws of Rhode Island, the assignment under which the plaintiff claims is valid as against creditors in that State. It is an assignment of all the debtor's property, both real and personal, to the plaintiff, in trust for the benefit of his creditors. The plaintiff came to this Commonwealth and took possession, under the assignment, of the property in question before it was attached. But at the time of the attachment, no creditor had become a party to the assignment, or had assented to it; and the only consideration for it was the plaintiff's acceptance of the trust.

The question is how far our courts are bound to recognize assignments of this kind made in other States as against our own citizens claiming to hold by attachment property found in this Commonwealth. The question is clearly settled by the decisions.

Independently of insolvent laws, or assignments for the benefit of creditors authorized by statute, it has always been held by this court that voluntary assignments by a debtor in this Commonwealth in trust for the payment of debts, and without other adequate consideration, are invalid as against an attachment, except so far as assented to by the creditors for whose benefit they were made. *Edwards v. Mitchell*, 1 Gray, 239. *May v. Wannemacher*, 111 Mass. 202. The assent of creditors is not presumed, but must be shown by some affirmative act, such as presenting claims, or becoming parties to the written assignment. *Russell v. Woodward*, 10 Pick. 407, 413. Such assignments made by judicial or

legislative authority in another State are not held binding here. *Taylor v. Columbian Ins. Co.* 14 Allen, 353. And an assignment made by the debtor himself in another State, which, if made here, would be set aside for want of consideration, will not be sustained against an attachment by a Massachusetts creditor, although valid in the place where it is made. There is no comity which requires us to give force to laws of another State which directly conflict with the laws of our own, or to allow to the act of a debtor resident in another State an effect in disposing of his property, as against his creditors here, which it would not have if he lived in Massachusetts. *Zipcey v. Thompson*, 1 Gray, 243. *Swan v. Crafts*, 124 Mass. 453. *Osborn v. Adams*, 18 Pick. 245. *Fall River Iron Works v. Croade*, 15 Pick. 11. In the language of Mr. Justice Morton in the case last cited, "Assignments by insolvent debtors in trust to pay their debts, either in a specified order or *pro rata*, are not deemed of sufficient validity to protect the assigned property from the attachments of the creditors of the assignor. There is no adequate consideration; and without this, no insolvent debtor can so dispose of his property as to place it beyond the reach of his creditors. The validity of such assignments must depend upon the assent of the creditors." "If they decline or omit to join in the assignment, there are no *cestui que trusts*, and so no trusts to be executed, and the consideration entirely fails."

The subsequent assent of the Rhode Island creditors to this assignment, manifested by proving their claims under it, cannot defeat the title to this property which the creditor in Massachusetts acquired by his attachment. *Bradford v. Tappan*, 11 Pick. 76. *Ward v. Lamson*, 6 Pick. 358.

Judgment for the defendant.

O. B. Mowry, for the plaintiff.

G. E. Smith, for the defendant.

JOHN M. REITENBACH & others vs. FRANCIS M. JOHNSON
& others.

Suffolk. Nov. 11, 1879. — Sept. 9, 1880. MORTON & SOULE, JJ., absent.

If a merchant, who is under no obligation to procure insurance against fire upon goods which he has sold and which have not been removed from his shop, but who is obliged to procure insurance upon goods consigned to him for sale, procures a general policy of insurance upon his own goods, those consigned to him for sale, and those sold but not removed, and, upon a loss taking place, includes these three classes in his statement of loss, he is not responsible to the purchaser of goods sold but not removed for a proportionate part of the money received upon his policy of insurance, if such amount is not greater than he would have received if he had included in his statement of loss merely his own goods and those consigned to him.

ENDICOTT, J. The plaintiffs seek in this action to recover a portion of certain insurance money, received by the defendants, and which they contend was paid to the defendants for them and as their agents.

It appears from the agreed statement of facts that the defendants effected insurance, in their own name, to the amount of \$165,000, upon merchandise contained in their warehouse in Boston. It was described in the policies of insurance as "merchandise, principally hides and leather, their own, or held by them in trust, or on commission, or sold but not removed from the building." The warehouse, with its contents, was totally destroyed by fire in November 1872. At the time of the loss, it contained goods belonging to the defendants, and goods consigned to them for sale, amounting in value to the sum of \$174,078, and goods sold but not removed, of the value of \$80,551. Among the goods sold but not removed were certain goods of the plaintiffs, which they had purchased of the defendants. The defendants rendered to the insurers a statement of loss, which included all the goods in the building at the time of the fire, viz.: their own goods, goods consigned to them, and goods sold but not removed; and the insurers settled, as for a total loss, to the amount of \$165,000. Some of the insurance companies were rendered insolvent by the fire, and the defendants received but sixty-three per cent of this amount. The goods owned by, and consigned to, the defendants, being of greater value than the

total amount of insurance, the adjusters testified that the same amount would have been allowed, if the "goods sold but not removed" had not been included in the proof of loss.

The facts find that the defendants were bound by contract with their consignors to insure all their consignments, and, as the amount of insurance on the face of the policies, as well as the sum actually received from the insurers, was not sufficient to cover the loss on their own goods and the goods consigned to them, the sum received was applied to indemnify themselves and their consignors, and no portion of it was applied for the benefit of the plaintiffs.

It is agreed that it was usual for those engaged in this business to take insurance on goods sold and not delivered or removed, but that there was no custom to insure for the benefit of purchasers, or for the purpose of protecting the interest of purchasers in goods sold but not removed; and that there was no contract, express or implied, between the plaintiffs and defendants, to insure for the plaintiffs' benefit the goods thus purchased by them. The plaintiffs, therefore, are not entitled to recover an aliquot portion of the insurance money received by the defendants, on the ground that it was the duty of the defendants to insure their goods not removed from the warehouse. And the only ground upon which they could recover is, that, the defendants having voluntarily insured the plaintiffs' goods, and received from the insurers money on account of the same, they are bound in equity to pay it over.

What might have been their duty if they had been bound, by contract or custom, to insure the plaintiffs' goods, or if they had received more than enough to pay themselves and their consignors, are questions which do not arise here. But the defendants received no money on account of the goods of the plaintiffs; the money that they have received is not sufficient to pay for their own goods and those of their consignors, destroyed by the fire; and there is no equity, as between them and the plaintiffs, which requires them to pay over to the plaintiffs any portion of the money so received. The fact that they included goods sold but not removed, in their statement of loss, cannot, of itself, give any rights to the plaintiffs which they did not otherwise possess. The defendants were under no obligation to include these goods

in their statement of loss. If they had been omitted from the statement, the defendants would have been entitled to receive the same amount, and they have not actually received any more because they were included. *Martineau v. Kitching*, L. R. 7 Q. B. 486. *Stillwell v. Staples*, 19 N. Y. 401.

Judgment for the defendants.

H. D. Hyde, for the plaintiffs.

R. R. Bishop, for the defendants.

PHILIP SMITH *vs.* BOSTON GAS LIGHT COMPANY.

Suffolk. Nov. 14, 1879. — Sept. 9, 1880. MORTON & SOULE, JJ., absent.

In an action against a gas company for injuries received by the plaintiff, by the inhalation of gas, which escaped from the defendant's pipes, it appeared that the plaintiff, who was too young to testify, occupied the same room and bed with his mother; that the door of the room in which they slept was broken open in the morning, and the plaintiff was found insensible by the dead body of his mother, whose death was caused by the escaping gas; that the escaping gas came from a crack in the pipe laid by the defendant through the street on which the plaintiff lived; that there were no gas fixtures in the room; and there was no evidence that the plaintiff or his mother had notice of escaping gas, or were conscious of its presence in the room in time to leave or to take any precautions to prevent the consequences by opening doors or windows. There was also evidence that, on the day before the accident, there was no smell of gas in the street; and that the mother was a sober and prudent woman. *Held*, that there was evidence sufficient to support a verdict for the plaintiff. *Held, also*, that a ruling "that there was evidence enough of want of proper care on the part of the defendant to make it responsible, on the ground that it was bound to conduct its gas in a proper manner, and that the fact that the gas escaped was *prima facie* evidence of some neglect on the part of the defendant," was not open to exception.

TORT for personal injuries occasioned to the plaintiff, a minor under five years of age, by the inhalation of gas, which escaped from the defendant's pipes. Trial in this court, before Ames, J., who, after a verdict for the plaintiff, reported the case for the determination of the full court. If, upon the facts, which appear in the opinion, there was any evidence to be submitted to the jury upon the questions of due care on the part of the plaintiff or those in charge of him, and of any negligence on the part of the

defendant which caused the injury, and if the rulings were correct, judgment was to be entered on the verdict; otherwise, judgment for the defendant, or a new trial ordered.

C. P. Greenough, for the defendant.

S. A. B. Abbott, for the plaintiff.

COLT, J. The plaintiff is a child of tender years. The escape of gas which caused the injury to him at the same time caused the death of his mother. The two occupied the same room and bed. Upon the question of the due care of the plaintiff and of his mother, who then had him in charge, the evidence presents as full a disclosure of the facts as the nature of the case allows. The plaintiff himself is too young to testify, and it does not appear that there is any other person living who can be called to give an account of them. The door of the room in which these persons slept was broken open in the morning, and the plaintiff was found insensible by the dead body of his mother. The escaping gas came from a crack in the pipe laid by the defendant corporation through Thatcher Court. There were no gas-fixtures in the room; and there was no evidence that the plaintiff or his mother had notice of escaping gas, or was conscious of its presence in the room, in time to leave or to take any precautions to prevent the consequences by opening doors or windows. There was evidence that, on the day before the accident, there was no smell of gas in the court; and there was also evidence that the mother was a sober and prudent woman. The jury may well have found that the crack in the pipe and the escape of gas first occurred some time during the night of the accident; and would be justified in finding that neither the plaintiff nor his mother was chargeable with want of ordinary care in preventing or escaping the result.

The burden is upon the plaintiff to show that he and his mother were in the exercise of due care in respect to the occurrence from which the injury arose. But this, as was said in *Mayo v. Boston & Maine Railroad*, 104 Mass. 137, 140, although, in form, a proposition to be established affirmatively, need not be proved by affirmative testimony addressed directly to its support. It may be shown by evidence which excludes fault, and, in the case at bar, there is nothing which excludes the inference that both mother and child on that night went to bed and to sleep in

the usual manner, with nothing to indicate that there was unusual exposure to injury; and that they were suffocated in their sleep by the gas which escaped from the defendant's pipes. If this was so, they were clearly in the exercise of such care as prudent people ordinarily use under circumstances of similar exposure to injury from hidden and unsuspected causes. *Craig v. New York, New Haven & Hartford Railroad*, 118 Mass. 431. *Commonwealth v. Boston & Lowell Railroad*, 126 Mass. 61, 68. *Hinckley v. Cape Cod Railroad*, 120 Mass. 257.

The judge ruled at the trial, "that there was evidence enough of want of proper care on the part of the defendant to make it responsible, on the ground that it was bound to conduct its gas in a proper manner; and that the fact that the gas escaped was *prima facie* evidence of some neglect on the part of the defendant." Taking the whole ruling, as applied to the facts in the case, we cannot say that it was wrong. The declaration was for an injury caused by the defendant's negligence in permitting its gas-pipes to be defective and out of repair. The point at the trial was whether the injury was so caused or not. The defendant was authorized by law to lay down pipes and convey gas under the surface of the public streets, and was bound to use proper care and prudence in the conduct of its business, having reference to the delicate and dangerous character of the material in its charge. It was especially bound to exercise this care in the proper location, structure and repair of the pipes, so that there would be no escape of gas dangerous to life and health. The question was plainly ruled upon as a question of negligence to be left to the jury. The evident intent and the reasonable understanding of the ruling of the judge was this and no more, that there was sufficient evidence upon that question to warrant the jury in finding a verdict for the plaintiff. The language used cannot be fairly construed as imposing absolute liability upon the defendant for the escape of gas, without regard to the question of negligence, or as asserting that the defendant was bound at its peril not to permit its escape; and there is no occasion to inquire whether the doctrine of *Rylands v. Fletcher*, L. R. 3 H. L. 330, as applied in *Shipley v. Fifty Associates*, 106 Mass. 194, and in *Gorham v. Gross*, 125 Mass. 232, is applicable to injuries of this description. The jury upon the evidence here reported

would, in our opinion, be justified in finding the defendant guilty of the negligence charged. The escape of gas from a defective pipe into the room occupied by the plaintiff, with no explanation of the cause other than was here offered, was some evidence of neglect. The pipes were made to contain the gas and conduct it safely, and it was the defendant's duty to see that they were constructed in a proper form and of proper material; and that they were laid in the ground at a suitable depth and in a suitable manner, and kept in proper repair for that purpose. The construction and care of the works were exclusively in the hands of the defendant, and no cause independently of some negligence on its part is shown to have produced the defect. *Le Barron v. East Boston Ferry Co.* 11 Allen, 312. *Feital v. Middlesex Railroad*, 109 Mass. 398. *Kendall v. Boston*, 118 Mass. 234.

In *Hutchinson v. Boston Gas Light Co.* 122 Mass. 219, cited by the defendant, the difference is, that the injury to the pipes and the leakage of gas were produced by other causes, such as the excessive heat, the fall of heavy buildings, and the other destructive agencies of a great conflagration. But beside this, there was in the case at bar some evidence that the pipes were not laid with sufficient care, or made of proper material with reference to the action of the frost, and were, therefore, more liable to break in the winter time, when this accident occurred.

There was evidence in support of both the propositions which the plaintiff was required to maintain to justify a verdict in his favor; and the rulings of the court were sufficiently favorable to the defendant.

Judgment on the verdict.

JUSTUS J. SMITH vs. FREEMAN FLANDERS.

Suffolk. Nov. 17, 1879. — Sept. 9, 1880. MORTON & SOULE, JJ., absent.

A contract for the erection of a building provided that the work should be done in all respects according to the plan and specifications which had been furnished by the architect. One clause in the specifications required "all walls to be vaulted." By the plan, the walls of the building appeared to be sixteen inches in width, without the appearance of any vault or space intended to be left in them. *Held*, that, by the contract, the walls were to be only sixteen inches including the vault; and that parol evidence was inadmissible to explain the contract.

If A. contracts with B. to do certain work, and makes a sub-contract with C. for certain materials which B. by his contract with A. is required to furnish, and, after C. has begun to make the materials, the contract is abandoned by A., the liability of B. to C. for loss of materials and profits is a proper element of damage in an action by B. against A.

If a person summoned as trustee is indebted to the principal defendant upon a demand where interest would be recoverable by the latter only as damages for breach of contract, interest will not be deemed to accrue during the pendency of the trustee process.

COLT, J. By contract with the city of Lawrence the defendant agreed to build an armory. The plaintiff by sub-contract agreed with the defendant to do the stone, brick, iron and slate work, and furnish the materials therefor. The city abandoned the contract before the work was commenced, and this action is brought to recover the damages sustained by the plaintiff by reason of such abandonment.

The defendant's agreement with the plaintiff was by a written contract, which provided that the work should be done in all respects according to the plan and specifications which had been furnished by the architects. One of the clauses in the specifications required "all walls to be vaulted and to be bound across by turning headers," and another clause required the builder in every respect "to complete and finish all mason work in a good and workmanlike manner." By the plan referred to, the brick walls of the building, which in the plan are shaded with red, appear to be sixteen inches in width without the appearance of any vault or space intended to be left in them.

The defendant asked the judge to rule that the contract, plan and specifications called for a wall containing sixteen inches of

masonry, exclusive of the vault. This was properly refused, because such a construction would require a wall of greater width than the contract by its reference to the plan required. There is nothing to control this reference, or to show that the wall was to be more than sixteen inches wide from the outside to the inside of the same. There is no conflict between the plan and specifications, and no room for uncertainty of construction on that point. The discrepancy, if any, is between the clause in the specifications, which distinctly and positively requires the walls to be vaulted, and the plan, which shows no marks for spaces to be left. But as between the positive requirement of a written clause in the contract and a plan referred to, which, though perfect in other respects, shows an omission to indicate thereon this single matter of detail, there can be no doubt that the written clause must control the mere implication derived from the omission in the plan. This is in analogy to the rule by which, when there is discrepancy or repugnancy between the written and printed portions of a contract, the former will prevail over the latter, for the reason that there is more ground for supposing that the printed part has not been modified to conform to the written portion through inadvertence, than for supposing that the special written provisions, to which the attention of the parties was more closely given, were adopted without consideration and against the intention of the parties. *Robertson v. French*, 4 East, 130.

The defendant further contended that at least there was such ambiguity as to render parol evidence competent to explain the contract; and thereupon offered an architect and builder as a witness, to show that in his opinion the contract called for a wall of sixteen inches exclusive of the vault, or of eighteen inches including it, and that it would be impracticable and unsafe to build a sixteen-inch wall with a vault. But the court properly rejected this evidence, and ruled that, by the contract, the walls were to be only sixteen inches including the vault. For the reasons above given, there appears to be no ambiguity in the contract which is open to explanation by parol evidence. The construction of the contract was for the court; and, in our opinion, the construction given by the judge was right. The party for whom the work is done is to determine as to the character of

the work he requires, and, if done according to contract, he must take the risk of its being practicable and safe.

The plaintiff by his contract with Swett & Co. for iron work, which he was required to furnish by his contract with the defendant, and which the firm had begun to make when the contract of the city with the defendant was abandoned, had incurred a liability which was a proper element of damage in this action. The case was tried without a jury, and it does not appear from the bill of exceptions that the judge allowed anything as damages which could not be properly claimed in this action. He certainly could not properly rule, as matter of law, that damage for loss of materials or profits sustained by Swett & Co. could not be recovered in this action. *Fox v. Harding*, 7 Cush. 516.

But the court erred in allowing interest by way of damages from the date of the writ in this action. After the action was commenced, the present defendant was summoned in several actions as trustee of the present plaintiff. For anything that appears, these trustee suits are still pending. It is well settled that, when one summoned as trustee is indebted to the principal defendant upon a demand where interest would be recoverable by the principal defendant only as damages for breach of contract, interest will not be deemed to accrue during the pendency of the trustee process. *Huntress v. Burbank*, 111 Mass. 213. *Rennell v. Kimball*, 5 Allen, 356. *Adams v. Cordis*, 8 Pick. 260.

The defendant's exceptions are sustained upon this ground only. But, as the amount of interest thus allowed is easily ascertained, if the plaintiff will remit that amount, the

Exceptions may be overruled.

E. T. Burley, for the defendant.

• *A. A. Ranney*, for the plaintiff.

LAWRENCE MANUFACTURING COMPANY *vs.* LOWELL HOSIERY MILLS & others.

Suffolk. Nov. 19, 1879. — Sept. 9, 1880. MORTON & SOULE, JJ., absent.

Numerals, arbitrarily selected, and used on goods in combination with other devices to denote the origin of the goods, and not their quality, are a valid trade-mark; and a person who uses them, in combination with other devices which he has a right to use, may be restrained by a bill in equity from so using them, if he does so for the purpose of imitating the trade-mark, and his use is calculated to deceive, and does deceive, persons buying his goods.

COLT, J. This is a bill in equity, to restrain the defendant from using the plaintiff's trade-mark, and for compensation for the injury occasioned by such use. It was heard by a single justice of this court, upon the pleadings and proofs. The judge was of opinion that the plaintiff was entitled to the relief prayed for, and reported the case for the consideration of the full court.

The alleged trade-mark of the plaintiff consists of the figure of an eagle, surmounting a wreath formed of the branches of the cotton plant. The wreath encloses the words "Lawrence Manufacturing Company" printed in a circle, having underneath it the word "trade-mark," and, below all, the figures "523," printed in large hollow block numerals. This device had been stamped for many years on hosiery of a certain grade, and was known and recognized as indicating that the goods so marked were of the plaintiff's manufacture. Before this, the plaintiff had used an eagle and scroll in combination with other numerals as a trade-mark, upon the same grade of hosiery; and the wreath and eagle of the present device, without the numerals 523, or any other numerals, had been previously used on other grades of its goods.

The stamp adopted by the defendant, in alleged imitation of the plaintiff's stamp, consists of an eagle surmounting a double circle or garter, on which are printed the words "extra finish iron frame," and beneath which are the figures "523," printed in large hollow block numerals, of the size and description used by the plaintiff, and occupying the same position with reference to other parts of the device. This stamp the defendant has placed upon hosiery goods made by it for the purpose of

imitating the plaintiff's stamps, and in order that such goods might be supposed to be of the plaintiff's manufacture; and it was found by the judge that the plaintiff's customers had been misled and deceived thereby. The eagle and garter were used by the defendant before the alleged trade-mark of the plaintiff was adopted; and, at the argument, the plaintiff made no claim to the exclusive use of them, when not combined with the numerals "523."

The only question presented upon this report, therefore, is whether the plaintiff's stamp, including the figures, constitutes such a trade-mark as the law will protect. The statutes of this Commonwealth protect a person who uses any peculiar name, letters, marks, devices or figures, upon an article manufactured or sold by him, to designate it as an article manufactured by him. Gen. Sts. c. 56, § 1. It has been said that there can be no exclusive right to use marks, figures and letters which are intended merely to indicate the quality of the fabric manufactured, as distinguished from those marks which are intended to indicate its origin, because one has no right to appropriate a sign or symbol or mark, which, from the nature of the fact it is used to signify, others may use with equal truth, and therefore have an equal right to employ for the same purpose. *Manuf. Co. v. Trainer*, 101 U. S. 51. And in *Canal Co. v. Clark*, 13 Wall. 311, it was declared by Mr. Justice Strong that no one can claim protection for the exclusive use of a mark which would practically give him a monopoly in the sale of any goods other than those of his own manufacture. See also *Gilman v. Hunnewell*, 122 Mass. 139. Letters and figures, when used only for the purpose of denoting quality, are from the very nature of the use incapable of exclusive appropriation.

These considerations would be decisive, if the plaintiff here claimed the exclusive right to the numerals "523," when used only to indicate the quality, and not with reference to the origin, of the goods. But such is not the plaintiff's position. Its claim is that the purpose of using these figures in connection with the other parts of its trade-mark was to aid the buyer in distinguishing its goods from similar goods made and sold by others.

A trade-mark when applied to manufactured articles may well consist of the name and address of the manufacturer, with the

addition of some peculiar device or emblem, some curious forms or figures, so disposed as to attract attention, impress the memory, and advertise more effectually the origin of the article to which it is attached. This affords a wide field for ingenuity in producing designs, which the increasing variety of modern trade-marks shows is not wholly neglected, and it may be that even numerals or letters of the alphabet can be combined and printed in such unusual and peculiar forms, that the result would be quite sufficient for use as a trade-mark. The difficulty of giving to bare numbers the effect of indicating origin or ownership, and of showing that the numbers used were originally designed for that purpose, was recognized in *Boardman v. Meriden Britannia Co.* 35 Conn. 402. But it was said in that case that, if once shown to have been used for that purpose, and to have had that effect, it would not be easy to assign a reason why they should not receive the same protection as trade-marks. The numbers in that case were, however, associated with the name of the plaintiffs, and with the form, color and general arrangement of the labels used; and were held by virtue of that connection to form an important part of the trade-mark itself. See also *Gillott v. Esterbrook*, 48 N. Y. 374; *Glen & Hall Manuf. Co. v. Hall*, 61 N. Y. 226; *Kinney v. Allen*, 1 Hughes, 106; *Ransome v. Bentall*, 8 L. J. (N. S.) Ch. 161.

In coming to his conclusion, the judge who heard the present case found that the plaintiff adopted and used the numerals "523" as part of its trade-mark; and this finding is supported by the evidence. It appears that these figures were selected arbitrarily; that they were of unusual and distinctive form; that they were added to the original device, consisting of the eagle, the wreath and the plaintiff's name, at the time when the word "trade-mark" was also added; and that the whole, so composed, has been used as one trade-mark ever since. This mark was recognized and known as the plaintiff's mark, and goods so marked were described and called for as "523's."

The defendant's imitation was produced by using the same figures, printed in the same style, and placed as to the other parts of the device in the same relative position as the plaintiff's. These numerals constituted one of the most prominent features in the plaintiff's design, and, when used in connection with the

rest of the defendant's mark, were calculated to aid in deceiving the public.

It is not necessary that the resemblance produced should be such as would mislead an expert, or such as would not be easily detected if the original and the spurious were seen together. It is enough that such similitude exists as would lead an ordinary purchaser to suppose that he was buying the genuine article and not an imitation. *McLean v. Fleming*, 96 U. S. 245. *Gorham Co. v. White*, 14 Wall. 511. *Metzler v. Wood*, 8 Ch. D. 606.

The imitation in this case accomplished the result intended, and the entry must be *Decree for the plaintiff.*

L. M. Sargent, for the plaintiff.

G. F. Richardson, (*D. S. Richardson* with him,) for the defendant.

MARTHA C. STEVENS vs. WILLIAM D. HAYDEN & others.

Suffolk. Nov. 21, 1879. — Sept. 9, 1880. MORTON & SOULE, JJ., absent.

A bill in equity alleged that the plaintiff mortgaged a tract of land with a house thereon to A., and, as additional security, obtained a policy of insurance against fire, payable to the mortgagee in case of loss; that the plaintiff made a second mortgage to B., and subsequently conveyed the estate in fee to C., who assumed and agreed to pay the two mortgages; that C. afterwards conveyed the estate to D., who also assumed and agreed to pay both mortgages; that A., on receiving the amount of his note and mortgage, assigned the same, when overdue, to a bank, to hold as collateral security for the joint note of D. and E. to the bank, upon the payment of which the mortgage was assigned by the bank to E.; that the building insured was destroyed by fire, and D. and E. received a certain sum in settlement of the loss; that E. assigned the note and mortgage to F. after the plaintiff was entitled to have the insurance money indorsed on the note; and that the estate was not sufficient for the payment of the mortgages, unless the money so received was applied in payment. The only persons named in the bill as defendants were D. and E. The prayer of the bill was that "the defendants" be ordered to indorse the insurance money on the note secured by the first mortgage, and to cancel the mortgage to that extent; and for general relief. *Held*, on demurrer, that the bill could not be maintained.

BILL IN EQUITY, alleging that on or about November 2, 1874, the plaintiff was the owner of a certain tract of land, with a

dwelling-house thereon, situated in Boxford in the county of Essex; that on or about November 2, 1874, she conveyed the said premises in mortgage to Julius A. Palmer, Jr., trustee, to secure the payment of her note for \$2000, of even date with the mortgage, and payable with interest at eight per cent per annum in three years from November 2, 1874; that, pursuant to the condition in said mortgage, she procured, at her own expense, a policy of insurance against fire, to the amount of \$2000, on said dwelling-house, and caused the same to be made payable, in case of loss, to Julius A. Palmer, Jr., trustee, mortgagee, as additional security for the payment of said note and mortgage to him; that, on or about July 1, 1876, she made a second mortgage of the premises to Edwin Eames, to secure the payment of her note for \$1500 in one year from July 1, 1876, with interest thereon at the rate of six per cent per annum, payable annually; that, on or about June 1, 1877, she conveyed the estate in fee to George H. Jones, of Chelsea in the county of Suffolk, who assumed and agreed to pay said mortgages; that the plaintiff, at the request of Jones and as a part of the contract of sale, caused the time of payment of the second mortgage to be extended until January 1, 1879, by Eames, and, in order to obtain such extension, the plaintiff was obliged to and did advance to Eames, from time to time, large sums of money, amounting in all to nearly the entire amount of the second mortgage, upon the understanding and agreement that the same should be repaid to her when the second mortgage was paid; that, in November 1877, the said dwelling-house was wholly destroyed by fire; that on or about , 187 , Jones conveyed said estate in fee "to the defendant William D. Hayden," of Somerville, he assuming and agreeing to pay said mortgages as part of the consideration for the sale to him by Jones; that Palmer demanded of William D. payment of said first-named note and mortgage, and William D. and his brother, Joseph O. Hayden, of Somerville, "the other defendant," upon their joint note, borrowed of the First National Bank at East Cambridge the amount due on said first note and mortgage, and paid the same to Palmer, and, instead of taking a discharge of the first mortgage by Palmer, caused the same to be conveyed by Palmer to John C. Rullard, cashier of said bank, as security for the payment of said

note of William D. and Joseph O.; and, upon payment of said last-named note, said Bullard assigned said first note and mortgage to Joseph O. Hayden; and at the time Palmer demanded payment, and was paid as aforesaid, said first note and mortgage was overdue; that thereafterwards William D. Hayden and Joseph O. Hayden demanded of said insurance company, under and by virtue of the insurance policy, payment for the loss of said house, and, on or about March 25, 1878, they received from the insurance company the sum of \$1500, in settlement of the loss; that nothing has been paid by or on behalf of Jones or William D. Hayden, on account of her said second mortgage, and, by reason of the destruction of said house, the remaining estate is not sufficient security for the payment of \$1500 unless the amount received by William D. Hayden and Joseph O. Hayden shall be applied in payment of said first mortgage; that William D. Hayden sold said first mortgage, and the note thereby secured, to George H. Burrows, of Boston; and Joseph O. Hayden assigned the same to Burrows on or about July 1, 1878, and long after the same was overdue, and after the plaintiff was entitled to have said \$1500 indorsed on said note.

The prayer of the bill was that "the defendants" be required to answer the allegations of the bill, but not under oath, and that a subpoena in due form issue; that "the defendants" be ordered to indorse upon the note secured by said first mortgage the payment of \$1500 as of March 25, 1878, and to cancel the mortgage to that extent; and for further relief; that a writ of injunction issue, restraining Joseph O. Hayden and George H. Burrows from transferring said first mortgage, or the note secured thereby, and from foreclosing said note and mortgage.

W. D. Hayden and J. O. Hayden demurred to the bill for want of equity. *Ames, J.* overruled the demurrer; and these defendants appealed.

C. P. Weston, for the defendants.

W. A. Herrick, for the plaintiff.

COLT, J. This case comes up on demurrer. The substantial allegations of the bill are that the plaintiff, in 1874, mortgaged her real estate to Palmer, and, as additional security, obtained a policy of insurance against fire, payable to the mortgagee in case of loss. In 1876, she gave a second mortgage to Eames, and, in

June 1877, conveyed the estate in fee to Jones, who assumed and agreed to pay the two mortgages. Jones afterwards conveyed the same to William D. Hayden, who, as part of the consideration, also assumed and agreed to pay both mortgages. Palmer, on receiving the amount of his note and mortgage, assigned the same, when overdue, to a bank in Cambridge, to hold as collateral security for the joint note of William D. and Joseph O. Hayden to the bank, upon the payment of which the mortgage was assigned by the bank to Joseph O. Hayden. The building insured was destroyed by fire in 1877, and, in March 1878, the Haydens received the sum of fifteen hundred dollars in settlement of the loss.

The bill then alleges that Joseph O. Hayden assigned the note and mortgage to Burrows, in July 1878, after the plaintiff was entitled to have the insurance money indorsed on the note; and that the estate is not sufficient for the payment of the mortgages, unless the money so received is applied in payment. The prayer is, that the defendants may be ordered to indorse the insurance money upon the note secured by the first mortgage, and may be required to cancel the mortgage to that extent; and for general relief.

These allegations fail to bring the case within any known head of equity jurisdiction. The bill is not brought to redeem a mortgage, because the plaintiff shows that she has parted with all title to the land, and the right to redeem both mortgages is apparently in William D. Hayden. It is not a bill to enforce a trust, because it is nowhere alleged that the plaintiff has any equitable title or interest in the land, or that the same is charged with a trust in her favor. It is not a bill for the cancellation of a written instrument obtained by fraud, the invalidity of which is not apparent on the instrument itself, because the allegations wholly fail to disclose such ground of complaint. *Fuller v. Percival*, 126 Mass. 381. No fraud, collusion or conspiracy against the plaintiff's rights is set forth. And, upon all the allegations in the bill, it does not appear that the plaintiff has suffered, or is likely to suffer, any loss by the failure or refusal of Hayden to apply the insurance money in payment of the first note and mortgage. It is not charged that she has been obliged to pay anything on account of the mortgages given by her; or that her

grantee, Jones, is insolvent, and unable or unwilling to perform his agreement to assume and pay the same; or that the Haydens are not fully able to respond for any misapplication of money received by them; and it fully appears that the note and first mortgage were assigned by Hayden to the present holder long after they were due, and are now held subject to all equities existing at the time of their transfer.

It is difficult to see what claim for equitable relief the pleader intended to set forth in "a clear and explicit statement," as required by the rules of this court, or whom she intended to make defendants. As was said in *Wright v. Dame*, 22 Pick. 55, 59, "Every material fact necessary to entitle the plaintiff to the relief prayed for must be contained in the stating part of the bill." "This part of the bill must contain the plaintiff's case, and his title to relief; and every necessary fact must be distinctly and expressly averred, and not in a loose and indeterminate manner, to be explained by inference, or by reference to other parts of the bill."

Demurrer sustained, and bill dismissed, with costs.



WOOSTER B. MAYHEW vs. GEORGE F. PENTECOST.

Suffolk. March 14, 1879. — Sept. 10, 1880. MORTON & ENDICOTT, JJ.,
absent.

An action upon a debt due to a bankrupt before his bankruptcy may be brought in the name of the bankrupt, with the consent and for the benefit of the assignee in bankruptcy, who is also the assignee in fact.

CONTRACT, stated in the writ, dated June 8, 1877, to be brought for the benefit of Lewis Coleman. At the trial in the Superior Court, before *Pitman, J.*, the plaintiff introduced evidence tending to prove the following facts:

On March 10, 1873, Mayhew paid the sum of \$176.34, and on November 19, 1873, the sum of \$231.25, for the benefit of the defendant, and at his request. On July 3, 1876, the defendant gave to Mayhew the following order: "Treasurer Second Baptist Society: Please pay W. B. Mayhew, Esq., the following

sums : \$176.84, with interest from March 10, 1878, and \$281.25, with interest from November 19, 1878, for money advanced to me while treasurer of the said society, and charge to me. Boston, July 3, 1876. George F. Pentecost."

On July 11, 1876, Coleman lent from his own money to Mayhew the sum of \$425, and took from Mayhew a borrowed and received memorandum for this sum, with this order as collateral security therefor, upon a statement by Mayhew that the order, and the debt which it represented, belonged to his wife as a gift from him for the purpose of enabling her to pay the interest on a mortgage, and the taxes upon the house in which she lived and of which she had the title, and that the money was to be now so applied, and upon the then belief of Coleman that the debt did not belong to the estate. The judge ruled that the gift to the wife was not valid, and held this statement to be immaterial.

It was admitted that, on March 8, 1876, a petition was filed against Mayhew in bankruptcy in the District Court of the United States for the District of Massachusetts; that, on April 18, 1876, Coleman was chosen the assignee in bankruptcy of Mayhew, and an assignment duly made to him of the estate of the bankrupt; and that proceedings under that petition are still pending.

The plaintiff, at the trial, asked leave to file an affidavit of Coleman, in these words: "I, Lewis Coleman, named as plaintiff in interest in this cause, on oath depose and say that the same is prosecuted by me, in the name of Mayhew, not only for my benefit as assignee in fact of the causes of action in the declaration set forth, but also for my benefit as assignee in bankruptcy of said Mayhew, so far as said causes of action may belong to me as assignee in bankruptcy. And I ask to make this affidavit a part of the record, so that the judgment may be conclusive upon me as assignee in bankruptcy, as well as assignee in fact." The defendant objected to the filing thereof. But the judge allowed the same to be filed in the case for the benefit of whom it might concern; ruling, nevertheless, that it could not affect the rights of the defendant in any way, or affect the legal question as to the right of the plaintiff to maintain this action.

The defendant requested the judge to rule that, upon these facts, this action could not be maintained; that the right to

recover the sums of money paid by Mayhew for the benefit of the defendant, and the draft which represented it, passed by the assignment in bankruptcy to Coleman; and that suit to recover the same must be brought in the name of Coleman as such assignee. The judge refused so to rule, but ruled that the action might be maintained in the name of the plaintiff for the benefit of the parties in interest, whoever they might be; and the defendant alleged exceptions.

M. Storey & B. L. M. Tower, for the defendant, cited *Kinnear v. Tarrant*, 15 East, 622; *Beckham v. Drake*, 2 H. L. Cas. 579; *Hodgson v. Sidney*, L. R. 1 Ex. 313; *Morgan v. Steble*, L. R. 7 Q. B. 611, 614; *In re Young*, 12 W. R. 537; *Herndon v. Howard*, 9 Wall. 664; *Knox v. Exchange Bank*, 12 Wall. 379; *Cook v. Lansing*, 3 McLean, 571; *Hodges v. Holland*, 19 Pick. 43; *Sigourney v. Severy*, 4 Cush. 176; *Drury v. Vannevar*, 5 Cush. 442; *Stone v. Hubbard*, 7 Cush. 595; *Robinson v. Hall*, 11 Gray, 483; *Parks v. Tirrell*, 3 Allen, 15; *Norcross v. Pease*, 5 Allen, 331; *Gay v. Kingsley*, 11 Allen, 345; *Nash v. Nash*, 12 Allen, 345.

J. H. Benton, Jr., for the plaintiff.

GRAY, C. J. By the recent bankrupt act of the United States, an assignment in bankruptcy vests in the assignee all the property owned by the bankrupt at the time of the commencement of the proceedings in bankruptcy, (with certain exceptions specified,) and all choses in action, debts, and rights of action of the bankrupt, "together with the like right, title, power and authority to sell, manage, dispose of, sue for and recover or defend the same, as the bankrupt might have had if no assignment had been made;" and "the assignee shall have the like remedy to recover all the estate, debts and effects in his own name, as the debtor might have had if the decree in bankruptcy had not been rendered and no assignment had been made." U. S. Rev. Sts. §§ 5044-5047.

The question whether an action upon a right belonging to the bankrupt at the time of the commencement of the proceedings in bankruptcy can be brought in his name, with the consent of the assignee, does not appear to have been decided by the Supreme Court of the United States. In *Herndon v. Howard*, 9 Wall. 664, an appellant from a Circuit Court became bankrupt

pending the appeal, and his assignee in bankruptcy moved to be admitted as a party appellant with him; Chief Justice Chase said that the bankrupt act seemed to require that the assignee should be substituted as appellant for the bankrupt, who might be said to be *civiliter mortuus*, precisely as an executor would be made party instead of an appellant actually deceased; but the point adjudged was, that the only form in which the assignee's motion could be granted was by admitting him in the place of the bankrupt, and not as a joint appellant. In *Knox v. Exchange Bank*, 12 Wall. 379, the decision was, that, when the bankrupt obtained his certificate of discharge before judgment in the court below in an action against him, he had no further interest in the case, and could not maintain a writ of error, but the assignee might prosecute the writ of error in his stead. Under the corresponding provisions of the bankrupt act of 1841, Mr. Justice McLean held that "all suits commenced after the appointment of the assignee should be brought in his name, or at least prosecuted for the benefit of the creditors whom he represents," and that a suit brought by the bankrupt, and not in either of those forms, could not be maintained. U. S. St. August 19, 1841, § 3. *Cook v. Lansing*, 3 McLean, 571.

But it is unnecessary to consider particularly the practice of the federal courts upon this subject, or the English decisions cited in the learned argument for the defendant. The question whether a suit upon a chose in action shall be brought in the name of the assignor or of the assignee, is a question of form of remedy only, and is to be determined by the *lex fori*. *Warren v. Copelin*, 4 Met. 594, 597. *Foss v. Nutting*, 14 Gray, 484. The bankrupt act not being a law of a foreign country, but a statute passed by Congress in the exercise of the powers conferred upon it by the Constitution, the assignee in bankruptcy may doubtless sue in his own name in the courts of this Commonwealth. *Ward v. Jenkins*, 10 Met. 583. *Stevens v. Mechanics' Savings Bank*, 101 Mass. 109. *Otis v. Hadley*, 112 Mass. 100. But no bankrupt act of the United States has undertaken to prohibit suits, upon debts due to the bankrupt before the bankruptcy, to be brought in the name of the bankrupt, with the consent of the assignee, in the courts of those States whose judicial procedure and practice allow suits to be so brought. There is a

dictum of Mr. Justice Dewey in *Ward v. Jenkins*, that a bankrupt would be incapable after bankruptcy of suing in his own name. 10 Met. 590. But that dictum, unless limited to the case of a bankrupt suing without the consent of the assignee, is inconsistent with the subsequent decisions of this court.

In *Drury v. Vannevar*, 5 Cush. 442, the payees of a witnessed promissory note, after the expiration of six years from the time when it became payable, were adjudged bankrupts under the act of Congress of 1841, and the assignee in bankruptcy sold and delivered the note, without any indorsement or writing, to one of the payees. The purchaser was held entitled to maintain an action thereon in the name of both payees for his own benefit; and the court said, "The defence has no reference whatever to the duty and obligation of the defendant to pay the note, but relates only to the manner of enforcing this duty and obligation." In that case, the title in the note vested by the assignment in the assignee in bankruptcy; the purchaser from him acquired no right, by any provision of the bankrupt act, or by any rule of law or practice, to sue thereon in his own name; and he did not undertake so to sue, but was allowed to maintain an action in the name of the bankrupts, the original payees of the note. The reason for bringing the action in their name was to take advantage of the exception in the statute of limitations. Rev. Sts. c. 120, § 4. Gen. Sts. c. 155, § 4. But the decision maintaining the action so brought is a direct adjudication that a promissory note held by a bankrupt before the bankruptcy might be afterwards sued in his name, when no rights of the assignee or of creditors would be thereby impaired.

Like decisions have been made under the provisions of the insolvent laws of this Commonwealth, from which the provisions of the recent bankrupt act were substantially taken. St. 1838, c. 163, § 5. Gen. Sts. c. 118, §§ 44, 47.

In *Stone v. Hubbard*, 7 Cush. 595, it was held, largely upon the authority of *Drury v. Vannevar*, that one who purchased, without indorsement, from the assignee of an insolvent debtor, a promissory note payable to the debtor before the insolvency, might maintain an action thereon in the name of the insolvent; and Mr. Justice Bigelow said: "It is upon its face like an ordinary chose in action, which can be enforced only in the name of

the assignor; and we can see no technical objection to a suit in the name of the payee, upon these facts. There is no variance between the declaration and proof. The promise was originally to the payee or his order, and the note, never having been indorsed, on its face is still payable only to the plaintiff. The promise is directly to the party who sues. The rights of the defendant are wholly unaffected by an action brought in the name of the plaintiff, instead of being in the name of the assignee or purchaser. Indeed, the suit could not stand more favorably for the defendant. Every ground of defence, even the right of set-off, is open to him in a suit in the name of the payee. Rev. Sts. c. 96, §§ 1-11. *Clark v. Parker*, 4 Cush. 361, 365. A recovery in this action would be a good bar to any other suit upon the note, as the payee, his assignee and the owner of the note would be alike concluded by the judgment."

The decisions in *Drury v. Vannevar* and *Stone v. Hubbard* have been often cited and approved. In *Pitts v. Holmes*, 10 Cush. 92, in which it was held that, under like circumstances, the action might be brought, at the election of the purchaser, in the name of the assignee in insolvency, it was said that in each of those two cases the disposition of the court had been, as in the present case, to protect the *bona fide* holder of a chose in action, so far as might be done compatibly with technical principles of law and the rights of other persons; and that the result of the whole was, to settle that a promissory note might be sued in the name of the insolvent debtor, or of the original payee, or of any *bona fide* indorsee, subject to all the appropriate equities. See also *Robinson v. Hall*, 11 Gray, 483; *Norcross v. Pease*, 5 Allen, 331; *Jones v. Dexter*, 125 Mass. 469; *Sawtelle v. Rollins*, 23 Maine, 196; *Foster v. Wylie*, 60 Maine, 109.

The decisions of this court, to which the learned counsel for the defendant have referred us, do not affect this case. In *Smith v. Chandler*, 3 Gray, 392, the action was not brought in the name of the bankrupt, nor with the consent of the assignee in bankruptcy, and the pendency of another action in the name of the assignee was held to be a sufficient answer to the suggestion that this action was prosecuted for his benefit. In *Parks v. Tirrell*, 3 Allen, 15, the action was to recover real estate, and the assignee in bankruptcy had in no way authorized or

consented to it. In *Gay v. Kingsley*, 11 Allen, 345, the assignee in insolvency had not consented to the action, and had no knowledge of the existence of the note sued on; and Mr. Justice Chapman said that, "if he had knowledge of its existence, he might not be obliged to claim it; and if he declined to do so, the insolvency might not be a valid defence."

In the case at bar, the plaintiff alleges that he brings this action for the benefit of Coleman. This allegation operates only as a notice of such rights as Coleman may have. *Carney v. Shanly*, 107 Mass. 568, 581. The affidavit afterwards made by Coleman, and allowed by the court to be filed in the case for the benefit of whom it might concern, conclusively shows that the action is prosecuted by Coleman, not only for his benefit as assignee in fact, but also for his benefit as assignee in bankruptcy, so far as the cause of action may belong to him in the latter capacity; and will prevent the defendant, after judgment in this action, from being held liable to any other suit for the same cause, either by the bankrupt for his own benefit, or by Coleman, whether as assignee *in pais* or as assignee in bankruptcy. This fact conclusively appearing upon the files of the court, the opinion expressed by the judge below, "that it could not affect the rights of the defendant in any way, or affect the legal question as to the right of the plaintiff to maintain this action," cannot enlarge the defendant's right of exception to the final ruling "that the action might be maintained in the name of the plaintiff for the benefit of the parties in interest, whoever they might be." The defendant, being liable on the note, and being protected from any future suit thereon, has no interest in the question whether the sum recovered shall be applied by Coleman to his own benefit, or be accounted for as part of the estate in bankruptcy.

Exceptions overruled.

LYDIA S. BRADSTREET & others vs. HARRIET P. BUTTERFIELD
& others.

Suffolk. March 24, 1879. — September 10, 1880.

A decree of this court appointing a trustee under a will made in a county other than that in which the will is admitted to probate, but in which part of the trust estate is situated, is not void, and cannot be collaterally impeached; and it is immaterial that the petition for the appointment of the trustee presented to and acted on by the court in one county was in form addressed to the court in another county.

A new trustee under a will, appointed by this court, under the Gen. Sta. c. 100, § 9, is not required to give a bond, unless such bond is required of him by the will, or by the order of the court appointing him.

WRIT OF ENTRY, dated March 18, 1875, brought to recover a parcel of land in that part of Boston formerly Charlestown. The case was submitted to the Superior Court, and, after judgment for the tenants, to this court on appeal, upon the following statement of facts:

The demandants are the heirs at law of James W. Stearns, late of Somerville, in the county of Middlesex, who died in 1863, and was a son of Sarah W. Stearns. The tenants are the heirs at law of Freeman Peacock, deceased.

Both parties claim title under the will of Sarah W. Stearns, late of Salem, in the county of Essex, which will was admitted to probate in that county on February 20, 1844, and by which she directed the residue of her estate to be divided among her children in nine equal shares, and made the following provisions:

“I give and bequeath one share thereof to my daughter Caroline, in trust for my son James W. Stearns, and his heirs; the income thereof, and such part of the principal as shall be judged necessary by said trustee, to be applied for the support of said James W. and his family. This trust is to continue during the natural life of said James; and the estate herein bequeathed for his use, remaining at the time of his decease, if any, shall descend to his heirs at law; or, if said trustee should otherwise determine, said trust may be terminated at any time, at the discretion of said trustee. Said trust to be held and executed by

my daughter Caroline as aforesaid, her heirs and assigns, the directions of my said son James W. to be regarded in all things relating to the trust property and the disposition of the same, so far as said trustee shall consider said directions reasonable and judicious. It is my will that none of the trustees herein named and appointed shall be required to give bonds at the Probate Office for the faithful performance of their respective trusts. It is my will that my estate shall be divided among my children, as far as the same can be judiciously done, provided my children can agree among themselves as to the distribution and division thereof. The trustees herein named are fully authorized to convey, by a good and sufficient deed, any portion of the real estate by them respectively held in trust: provided they shall deem a sale thereof for the interest of those for whose benefit and use said trusts are respectively created."

Caroline accepted the trust, and acted as trustee until her death in 1851, unmarried, and leaving her brothers and sisters her heirs. Sarah W. Stearns's estate was duly divided, and the demanded premises were duly assigned and set off to Caroline, as part of the share so devised to her in trust.

No further proceedings were had in relation to the trust until, at October term 1860 of the Supreme Judicial Court for the county of Middlesex, James W. Stearns filed and presented a petition for the appointment of a new trustee, which is copied in the margin.* The record of that case did not show that any notice was given, but, after reciting the substance of the petition, stated that, "upon hearing, it is ordered and decreed

* To the Honorable the Justices of the Supreme Judicial Court next to be holden at Boston, in the County of Suffolk:

Humbly petitioning, shows unto your Honors, James W. Stearns, of Somerville, in the county of Middlesex, that Sarah W. Stearns, late of Salem, in the county of Essex, died testate; that at the Court of Probate holden at the said Salem, on the third Tuesday of February, A. D. 1844, the will of the said Sarah was duly presented and allowed, approved and established, as the last will and testament of the before-named deceased; that in and by said will a large amount of real estate, situated in the counties of Middlesex, Suffolk and Essex, was devised to one Caroline Stearns, of said Salem, in trust for your petitioner, the income and principal of said trust estate to

by the court here that George W. Emery, Esq., of Medford, in said county of Middlesex, be and hereby is appointed trustee under the will of Sarah W. Stearns aforesaid, in place of Caroline Stearns, late of Salem, deceased, with all the powers and duties conferred upon said trustee appointed by the will, with power to take, hold, manage, alien and convey said trust estate as fully as is given by the will to said Caroline."

Emery never gave any bond as trustee, and no persons interested in the trust estate certified their consent that such bond should not be required. He was not the heir or assign of Caroline. In January and February, 1861, Emery, as such trustee, in consideration of the sum of \$1188 to him paid by Peacock, executed, acknowledged and delivered to Peacock deeds of the demanded premises; and Peacock immediately thereafter entered into possession of the premises, and made improvements thereon, and such possession has been continued by him and his heirs to the present time.

If the demandants were entitled to recover, judgment was to be rendered for them, with no damages for rents and profits, and the tenants were to have the right to remove the improvements; otherwise, judgment for the tenants.

W. S. Stearns & J. H. Butler, for the demandants.

C. Robinson, Jr., for the tenants.

GRAY, C. J. The validity and effect of the decree made by this court in Middlesex at October term 1860 depend upon the provisions of the General Statutes. Gen. Sts. c. 181, § 2.

The provisions of those statutes conferring general jurisdiction in equity upon this court do not usually direct in what county suits in equity shall be brought, but leave that question to be

be applied by said trustee for the support of said petitioner and his family, and by the provisions of said will said trust was to continue during the natural life of your petitioner; that said Caroline accepted such trust; that she has since died; that the objects of said trust are not accomplished, and that no adequate provision is made by said will for supplying the vacancy occasioned by the death of said Caroline.

Your petitioner, therefore, humbly prays your Honors to appoint a new trustee in order that the provisions of said will may be fully carried out according to the intent of the testator, and so in duty bound will ever pray

James White Stearns.

determined by the nature of the subject matter, the analogies to be derived from actions at law, and the practice of courts of chancery. The principal if not the only cases in which there is express legislation upon this point are those of suits for the redemption of lands from levy on execution or from mortgage, of which the Superior Court has concurrent jurisdiction, and which must be brought in the county in which the land lies ; and suits for the redemption of mortgages to the Commonwealth, which must be brought in this court in Suffolk. Gen. Sts. c. 103, § 29 ; c. 140, §§ 23, 48. Applications to this court sitting in equity for the appointment of trustees under a will have in practice been made either in the county in which the will has been admitted to probate, according to the rule governing the probate courts in like cases, or in a county in which land forming part of the trust estate is situated, according to the rule in real actions. Gen. Sts. c. 100, §§ 1, 7, 8, 9, 11, 14, 17, 22 ; c. 123, § 2. Although it is more usual and convenient that the appointment and the record thereof should be in the same county with the probate of the will, yet a decree made, without objection, in another county, in which part of the trust estate is situated, is not void, and cannot be collaterally impeached. Story Eq. Pl. §§ 486, 487. The fact that the petition presented to and acted on by the court in Middlesex was in form addressed to the court in Suffolk is immaterial.

If the objection of want of notice to all parties interested is open to the demandants in this action, (which is at least doubtful,) it is a sufficient answer that it does not appear that any person was interested in the appointment of a new trustee, except James W. Stearns, the petitioner ; for during his life it could not be known who would be his heirs at law ; and there was at that time no provision of statute requiring the appointment of any one to represent contingent interests. See *Greene v. Borland*, 4 Met. 330 ; Sts. 1863, c. 25 ; 1864, c. 168.

The new trustee must therefore be held to have been lawfully appointed, and the remaining question is whether his omission to give bond for the performance of his trust is fatal to the validity of the deeds executed by him, and under which the tenants claim title.

The demandants rely on the provisions of the Gen. Sts. c. 100, the construction and effect of which may be made clear by referring to the previous statutes incorporated therein, as was done by the court in the decisions by which it was established that no bond was required of trustees for public charities. *Lowell, appellant*, 22 Pick. 215, 220. *Drury v. Natick*, 10 Allen, 169, 176.

Under the Revised Statutes of 1836, which reenacted corresponding provisions of the St. of 1817, c. 190, every trustee under a will for minors or other persons, originally named therein or afterwards appointed by the judge of probate, (unless exempted by the testator, or by consent of all persons interested,) was required to give bond to the judge of probate. Rev. Sts. c. 69, §§ 1, 2, 4, 9. St. 1817, c. 190, §§ 37, 38, 40, 41. But those statutes in no way affected the general jurisdiction in equity of this court over trusts under deeds and wills and in the settlement of estates, and prescribed no rules as to the appointment of trustees by this court in the exercise of this jurisdiction, or as to the giving of bonds by trustees so appointed. Sts. 1817, c. 87; c. 190, § 37. Rev. Sts. c. 81, § 8. *Bowditch v. Banuelos*, 1 Gray, 220. Gen. Sts. c. 113, § 2.

The St. of 1848, c. 19, merely extended the provisions of the Rev. Sts. c. 69, §§ 7, 8, as to the removal of trustees and the appointment of new ones by the judge of probate, to trusts created by deed, without making any change in the law as to trusts created by will.

By the St. of 1852, c. 212, it was enacted that the justices of this court and the judges of the several courts of probate in the several counties might remove any trustee of an estate "created by deed, indenture or other instrument," and appoint a new trustee, with all the powers and duties of the original trustee; "such new trustee giving the like bonds and security as are required, if any, by the deed, indenture or other instrument creating the trust estate." This statute had no application to trustees originally named in a will or deed, or appointed to fill a vacancy arising from any other cause than removal by the court. In a case within its provisions, a bond must doubtless be deemed to be "required by the instrument creating the trust" when required either by the very terms of

the instrument, or by the general provisions of law applicable to the case.

Assuming the word "instrument" to include a will, the effect would be that a new trustee under a will, appointed pursuant to this statute, must give bond if required to do so by the terms of the will; if not required to do so by the terms of the will, he must still give bond if appointed by the judge of probate, because the Revised Statutes expressly so provided; but if appointed by this court, and not required by the terms of the will to give bond, then, as there was no statute requiring a bond in such a case, he need not give one, unless ordered to do so by the court in the exercise of its equitable discretion.

The General Statutes of 1860 reenact the provisions of the Revised Statutes requiring any trustee appointed by the probate court under a will to give bond, unless exempted by the testator or by consent of all persons interested. Gen. Sts. c. 100, §§ 1, 2, 4, 11. By § 9 the jurisdiction of the probate courts, concurrently with that of this court, to appoint new trustees, is extended to cases of any vacancy, from whatever cause arising; and it is provided that "such new trustee, upon giving the bonds and security required," shall have the same powers, rights, duties and estate as if originally appointed.

No bond being required of the trustee appointed by this court, either by the terms of the will, or by the provisions of the statutes, or by the decree appointing him, his omission to give bond for the performance of his trust does not impair the validity of his conveyances under which the tenants derive their title.

Judgment affirmed.

MARY S. HILLS vs. HOME INSURANCE COMPANY.

Suffolk. Nov. 21, 1879.—Sept. 10, 1880. MORTON & SOULE, JJ., absent

An award made by three arbitrators, two of whom had prejudged the case on *ex parte* testimony, is not binding upon a party to the submission to arbitration, especially if no notice of any meeting of the three is given to him.

A carpenter, who has built houses in various places, may be allowed to testify to the cost of building a house in a town in the vicinity of those where he has worked.

CONTRACT upon a policy of insurance against fire, in the sum of \$4500, for three years from October 30, 1877, upon certain buildings in the town of Norfolk, which were destroyed by fire on September 27, 1878. Writ dated February 27, 1879, and served on March 6 following. The answer contained a general denial, and alleged that the amount of the loss by the fire had been fixed by the award of arbitrators, chosen by the parties, under the following provision in the policy: "In case differences shall arise touching any loss or damage, after proof thereof has been received in due form, the matter shall, at the written request of either party, be submitted to impartial arbitrators, whose award in writing shall be binding on the parties as to the amount of such loss or damage, but shall not determine the liability of the company under the policy." Trial in this court, before *Endicott, J.*, who allowed a bill of exceptions in substance as follows:

On October 21, 1878, the proofs of loss having been presented to the defendant's agent, he demanded plans and specifications of the burned buildings, and requested an arbitration or appraisal of the loss, and named as arbitrator John J. Shaw. Subsequently, the plaintiff named Nelson Curtis as an arbitrator.

On December 11, 1878, the plaintiff and defendant signed an agreement in writing, by which they submitted the amount of the damage caused by the fire to the determination of Nelson Curtis and John J. Shaw, "together with a third person to be appointed by them, if necessary, their estimate or that of any two of them to be binding on both parties." Some time before January 20, 1879, the two arbitrators named agreed that John J. McNutt should act as the third arbitrator.

On January 20, 1879, Shaw went to the office of one Garbett, a surveyor and architect, who had been employed by the plaintiff to prepare plans and specifications of the building destroyed, in compliance with the demand of the defendant's agent, as before stated, and told him that the arbitrators were to meet that morning to hear the statement of Caleb S. Williams, who resided in Norfolk, and who had been notified by the agent of the defendant to be present that day, and requested Garbett to procure the attendance of Curtis at such meeting. Garbett said it was almost impossible to find Curtis at such short notice. Shaw then asked him what he should do if Curtis was not present, and Garbett replied, "Go ahead, don't wait for him." Shaw testified that he did not then know whether Garbett was acting as agent of the plaintiff or not; that he knew the attorney conducting this trial very well, and knew that he then acted as the attorney of the plaintiff; that no notice was given to either party of the proposed meeting of the arbitrators, except as above stated; and that it was not customary with him, or with arbitrators generally in insurance cases, to give notice of their meetings. Garbett testified that his reply to Shaw on the morning of January 20 was, to go ahead, he had better do something; and that he, Garbett, had not acted as the agent of the plaintiff.

Williams, having received notice from the defendant's agent, on January 20 went to the agent's office, and there met Snow and Shaw, and went with Shaw to a certain place, and there met McNutt, and having been sworn as an arbitrator with Shaw and McNutt, they subscribed the following oath on the back of the original submission to the arbitrators: "We, the undersigned, do solemnly swear, that we will act with strict impartiality in making an appraisal and estimate of the actual damage to the property of Mary S. Hills, formerly Mary S. Smith, insured by the Home Insurance Company of New York, agreeably to the foregoing appointment, and that we will return to said company a true, just and conscientious appraisal and estimate of damage on the same, according to the best of our knowledge, skill and judgment." Annexed to this was the jurat of a justice of the peace. They then made an award, appraising the damage to the plaintiff's property at \$8500, and returned it to the defendant's agent.

A copy of the submission and award, together with a copy of the paper appointing McNutt as third arbitrator, dated February 4, 1879, was sent to the plaintiff's counsel, who thereupon notified the defendant's agent that the plaintiff declined to admit the validity of the award.

On February 28, 1879, Shaw, Curtis and McNutt met and considered the matters embraced in the submission, and made an award, appraising the plaintiff's damage at \$3750. No notice of this meeting was given to the plaintiff or the defendant, but a copy of the award was sent to the attorney of the plaintiff on March 4, 1879.

When Shaw, McNutt and Curtis made the last-named award, the name of Williams was erased from the original award and oath, and the name of Curtis subscribed by him both to the oath and the award, below the name of McNutt, and the amount of the award was changed from \$3500 to \$3750.

The defendant contended that the award of Shaw, McNutt and Curtis was conclusive on the amount of loss or damage to the property destroyed; but the judge ruled, as matter of law, upon the foregoing facts, that such award was not conclusive upon this point, and that the plaintiff had a right to withdraw from the arbitration, as she did through her counsel before it was made. Evidence was introduced as to the value of the property by the plaintiff, and also by the defendant in reply.

At the close of the evidence the defendant requested the court to rule that the award of Curtis, Shaw and McNutt was evidence upon the question of the amount of loss or damage; but the judge declined so to rule.

The plaintiff called a witness, who testified that he was a carpenter and builder in Boston and vicinity, and had built in Boston, Malden, Newton, Roxbury and Swampscott, and had figured on the cost of buildings in Walpole, and had shipped lumber from Boston to Medway, an adjoining town to the town of Norfolk, but had no knowledge of such property in Norfolk, except from his experience in building; that, having examined the aforementioned plans and specifications, he could tell what it would cost to build such buildings in Boston or vicinity and knew the value of the same there; and that the difference, in building in Norfolk, was in a matter of freight. The witness

was then permitted, against the defendant's objection, to testify to the value of the buildings destroyed at the time of the fire.

The jury returned a verdict for the plaintiff for \$4598.73; and the defendant alleged exceptions.

W. P. Wilson, for the defendant.

A. Russ & D. A. Dorr, for the plaintiff.

AMES, J. The defendant places no reliance upon the first award, purporting to have been made by Williams, Shaw and McNutt. The arbitrator whom the plaintiff had selected took no part in the hearing, and apparently had no notice to attend. The other arbitrators saw fit to proceed without him, and, without any notice to the plaintiff, and of course without her consent or that of any person authorized to represent her, to substitute in his place a person whom the defendant had summoned to attend for the purpose of making a statement; an expression which we must suppose to mean, for the purpose of testifying as a witness called by the defendant. An award so obtained had no legal validity, and could in no sense be binding on the plaintiff.

For the apparent purpose of curing the defects of this proceeding, an attempt was made to procure a new award, to bear the signatures of the three arbitrators originally appointed. To this new proceeding, the plaintiff did not assent, but commenced this suit, without waiting for the result of the new hearing. It is argued on the part of the defendant, that, inasmuch as the plaintiff did not notify the arbitrators themselves of her dissent, there was no formal and sufficient revocation of the submission of the case to them. However that may be, the plaintiff is still at liberty to controvert the validity of the award on any other ground. Corruption, partiality or misconduct on the part of the arbitrators is a sufficient objection to an award, independently of any question as to a formal revocation of their authority. The facts reported show that two of the arbitrators at the second hearing were not impartial men, but had heard the case upon *ex parte* testimony, and had committed themselves to a decision which was not satisfactory to the plaintiff upon the very question in dispute. And this new hearing was had, not only after those two arbitrators had so committed themselves, and precluded the case, but without notice to the plaintiff. It

is true that much will be presumed in favor of an impartial and fair award, but the irregularity in this case takes it out of the general rule. *Conrad v. Massasoit Ins. Co.* 4 Allen, 20. *Strong v. Strong*, 9 Cush. 560.

With regard to the testimony of the expert, it appears from the bill of exceptions that he was a carpenter and builder in Boston and vicinity; that he had built in numerous places in the neighborhood of Boston; that from his experience in building, and from the examination of the plans and specifications, he could tell what it would cost to construct such buildings in Boston and its vicinity, and knew the value of the same there; and that the difference, in building in Norfolk, was only in a matter of freight. We think that this showed such a degree of experience and skill in the subject matter that the court might rightfully receive his judgment as to the value of the buildings destroyed by fire, as competent evidence for the jury to consider, leaving its weight to be judged of by them. The question as to his qualifications as an expert is largely within the discretion of the presiding judge, and we find no error in his decision. *Tucker v. Massachusetts Central Railroad*, 118 Mass. 546. *Lawrence v. Boston*, 119 Mass. 126. *Exceptions overruled.*



OWEN LAPPEN vs. JOSEPH H. GILL.

Suffolk. March 3. — Sept. 10, 1880. ENDICOTT & SOULE, JJ., absent.

The grantee in a deed, containing a stipulation that the land is subject to a mortgage which he assumes and agrees to pay, is liable to the grantor, who pays the mortgage after failure of the grantee to pay it, although the grantor, when he pays the mortgage, takes an assignment of it; and, in an action for the amount so paid, evidence is inadmissible that, at the time the mortgage was made, the grantor held the land in trust for the grantee and others, and the mortgage was given to take up the defendant's share of a previous mortgage.

CONTRACT for money paid. Trial in the Superior Court, without a jury, before *Brigham*, C. J., who allowed a bill of exceptions in substance as follows:

On July 3, 1876, the plaintiff executed and delivered to the Cambridge Savings Bank a mortgage deed of certain premises

in Cambridge, to secure his note of \$1300, with interest; and, on August 22, 1876, he executed and delivered to the defendant a quitclaim deed of the same premises, containing the following clause: "This conveyance is subject to a mortgage to the Cambridge Savings Bank for thirteen hundred dollars, with interest, which the grantee is to assume and pay, also the taxes of 1876." The defendant paid interest on the mortgage note due in January and July 1877, and January 1878, and taxes on the premises. The defendant not having paid the mortgage note of \$1300, the plaintiff voluntarily paid the same, and, on December 18, 1877, the bank assigned to him the mortgage and the note of \$1300 secured thereby. The last payment of interest on the note by the defendant was made to the plaintiff on January 10, 1878.

The defendant offered to prove that, at the time the plaintiff made the mortgage deed, the plaintiff held the legal title to the mortgaged premises for the benefit of the defendant and others, heirs at law of the defendant's father; and that the mortgage was given to take up the defendant's share of a previous mortgage of said premises given by his father.

The judge rejected this evidence as incompetent; and ordered judgment for the plaintiff for \$1427.50. The defendant alleged exceptions.

D. L. Withington, for the defendant.

C. F. Donnelly, for the plaintiff, submitted the case without argument.

AMES, J. It has been repeatedly decided that, if a grantee takes a deed containing a stipulation that the land is subject to a mortgage which he assumes or agrees to pay, a duty is imposed upon him by the acceptance of the deed, and the law implies a promise to perform it, on which promise, in case of breach, assumpsit will lie. *Fiske v. Tolman*, 124 Mass. 254, and the cases there cited. This defendant accepted such a deed, and has failed to pay the mortgage which he thereby assumed and agreed to pay. The plaintiff thereupon paid the mortgage debt, and has brought this action to recover the amount so paid. It is true that, instead of cancelling the note and mortgage, he has had them assigned to himself, but, in such a state of facts, such an assignment to the promisor of his own note and mortgage can have no other effect than as a discharge of the debt. *Brown*

v. Lapham, 3 Cush. 551. The transaction was in substance and effect a payment of the debt. *Carlton v. Jackson*, 121 Mass. 592. The facts which the defendant offered to prove, as to the trust under which the plaintiff held the land at the time of the mortgage, do not appear to us to furnish any ground for relieving the defendant of his legal obligation, and the evidence was therefore properly excluded. Even if the evidence as to the trust had been received, the payment was still for the defendant's benefit.

Exceptions overruled

ISABELLA WILLS, administratrix, *vs.* LYNN & BOSTON RAILROAD COMPANY.

Suffolk. March 4. — Sept. 10, 1880. ENDICOTT & SOULE, JJ., absent.

A passenger, who receives an injury by falling from the front platform of a street railway car while in motion, upon which he occupies a sitting position, against the rules of the corporation and the warning of the driver of the car, and without any reasonable excuse therefor, is not in the exercise of such care as will entitle him to maintain an action against the corporation.

It is a reasonable regulation of a street railway corporation, which it has the right to make, that passengers shall not be on the front platform of a car.

TORT against a street railway corporation, for personal injuries occasioned to John Wills, the plaintiff's intestate, by falling from the defendant's car. Trial in the Superior Court, before *Wilkinson, J.*, who directed a verdict for the defendant, on the ground that the plaintiff had not offered any evidence sufficient to warrant the jury in finding that her intestate was in the exercise of due care at the time of the accident; and reported the case for the determination of this court. The facts appear in the opinion.

B. E. Perry & C. P. Gorely, for the plaintiff.

W. W. Warren, for the defendant.

COLT, J. It is for the plaintiff to prove that her deceased husband was free from negligence contributing to the injury which he received from the acts of the defendant corporation. She cannot recover, if the case she presents fails to disclose the exercise on his part of ordinary care, as judged of in the light

of common knowledge and experience. The rule is to be applied which requires the exercise of such care as men of common prudence usually exercise in positions of like exposure and danger. The question is in most cases a question to be submitted to the jury, but when the circumstances are not complicated, and the undisputed evidence discloses conduct which would be condemned as careless by men of common prudence, it is the duty of the judge to instruct the jury to find a verdict for the defendant. *Gavett v. Manchester & Lawrence Railroad*, 16 Gray, 501. *Gahagan v. Boston & Lowell Railroad*, 1 Allen, 187. *Todd v. Old Colony & Fall River Railroad*, 7 Allen, 207. *Hickey v. Boston & Lowell Railroad*, 14 Allen, 429. See also *Baltimore City Passenger Railway v. Wilkinson*, 30 Md. 224.

It appears in this case, from uncontradicted evidence, that Wills, the plaintiff's intestate, on the night of this accident, got on the front platform of the defendant's car, and remained standing in that place until the car approached a drawbridge on the road, when he sat down on the platform with his feet on the step. He was told by the driver of the car that he had better not sit in that place, as it was against the rules of the company and unsafe, to which Wills made a reply not understood by the driver. Wills continued however to occupy his sitting position on the side of the platform while the car was detained at the bridge some fifteen minutes by an open draw; and remained there until he fell from the car after it had passed the bridge. There was conflicting evidence as to the speed of the car, but no evidence that it was unusual or unlawful at that place. There were notices posted on the under side of the roof of the platforms of this car, that all persons were forbidden by order of the directors to be on the front platform, and that the company would not be responsible for the safety of passengers while there.

This evidence wholly fails to show that the plaintiff's intestate was in the exercise of due care. He was a passenger, occupying an exposed and unusual place, in a constrained and awkward position, against the rules of the road and the warning of the driver. It does not appear that there was any excuse or justification for his conduct in the fact that the seats of the car were full, or that he was required or permitted by the defendant's

servants and agents to take that place. And there is no evidence that he took any precaution by holding on to the railing or otherwise to prevent the accident. A passenger is not justified in taking a risk unnecessarily; and courts have a right to consider well-known facts as bearing upon questions of this description. The case differs from *Meesel v. Lynn & Boston Railroad*, 8 Allen, 234. There the plaintiff had paid his fare, and was told by the conductor to go on the front platform with the driver and five or six other persons. He was thrown off while the car was turning a corner at unusual speed, and when he was standing up and holding on to an iron railing; and the court properly refused to rule, as matter of law, that he was not in the exercise of due care.

A street railway corporation has a right to make all reasonable regulations for the safety of passengers. A rule prohibiting passengers from riding on the front platform is a reasonable regulation, and one who knowingly violates it, without some reasonable excuse or necessity, cannot be said to be free from negligence, if the act contributes to his injury. There can be no doubt in this case that this negligence of Wills contributed to the injury which he suffered.

Judgment on the verdict.

CHASE LANGMAID vs. RICHARD R. HIGGINS & another.

Suffolk. March 8. — Sept. 10, 1880. ENDICOTT & SOULE, JJ., absent.

A passageway was laid out in the rear of lots of land which fronted on two streets, and ran in an easterly direction to another street, called S. Street; and it was subsequently extended by other owners of land in a westerly direction to the land of a third person. After this the owner of a lot of land, the rear of which was bounded partly by the passageway as first laid out, and partly by the passageway as extended, conveyed the lot, bounding it on the "passageway which runs to S. Street, with a right to the free use in common with others having rights therein of the said passageway leading to S. Street." *Held*, that the grantee had a right of way only to S. Street, and had no rights in the extended passageway westerly of his land, even if his grantor had rights therein at the time of the conveyance.

TORT for the erection of a brick wall and building across a passageway five feet wide, in the rear of the defendants' lot,

VOL. XV. 23

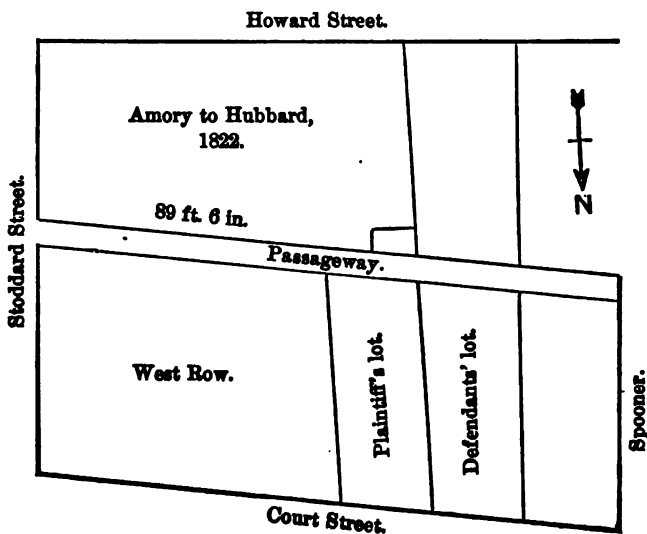
situated on the south side of Court Street in Boston, whereby the plaintiff was prevented from going in a westerly direction along the passageway, and the building on his lot was deprived of light and air. The location of the lots of the parties as to each other and the adjoining lots is shown on a plan, a copy of which is printed in the margin.*

Trial in the Superior Court, without a jury, before *Brigham, C. J.*, who ruled that the plaintiff was entitled to nominal damages for the obstruction to his use of the passageway, and to substantial damages for the injury to his right of light and air, and ordered judgment for the plaintiff in the sum of \$101. The defendants alleged exceptions, which appear in the opinion.

A. Russ & D. A. Dorr, for the defendants.

G. E. Smith, for the plaintiff.

COLT, J. The parties to this action own adjoining estates in Boston, on the south side of Court Street, in the rear of which, at the time of the injury complained of, there was a passageway extending in a westerly direction from Stoddard Street to land known as the Spooner estate. The plaintiff's lot lies easterly of the defendants' and nearer to Stoddard Street; and he seeks to recover damages for the defendants' obstruction of this way by the erection of a building over it in the rear of the defendants'



lot, which excludes the light and air from the premises of the plaintiff, and prevents his use of the west end of the way from the rear of his land to the Spooner estate.

The defendants contend that the passageway in question, which at the time of the alleged obstruction appeared to be a continuous way extending some one hundred and fifty feet from Stoddard Street to Spooner's land, was nevertheless two separate ways, laid out at different times by different owners as appurtenant to separate estates, and joining each other at a point eighty-nine feet and six inches from Stoddard Street; and that the plaintiff had no right of way over the westerly part.

In 1825, and for many years after, John Hubbard owned all the land which abuts on said passageway, except the corner lot bounded by Stoddard Street and Court Street, and called West Row. At that date, the passageway as laid out by previous owners extended only eighty-nine feet and six inches westerly from Stoddard Street. That distance carried it partly across the rear of the lot now owned by the plaintiff. The first mention of this passageway is in the deed of John Amory to John Hubbard, in 1822, of the lot on the corner of Howard Street and Stoddard Street, in which the north side of that lot is bounded on land "laid out as a passageway of five feet leading from the rear of said Amory's Cambridge Street estates to said Stoddard's Lane, and measuring on said passageway as the fence now stands about eighty-nine feet and six inches." By this deed a right of way for a distance of eighty-nine feet and six inches, and no further, is conveyed to Hubbard. At that time Amory had no Cambridge Street estates which were west of the lot now owned by the plaintiff. The estate which he then had on Cambridge Street, or Court Street as it is now called, was conveyed to Hubbard in 1825, who at about that time also acquired his title to all the land lying between it and the Spooner estate. At that time, the passageway did not extend in a westerly direction beyond the estate now owned by the plaintiff, and there was no evidence at the trial that it extended westerly of that estate before 1830. It does not indeed appear precisely when or by whom the same was extended. It only appears that, from 1830 to the time of the alleged wrongful act of the defendants in 1875, the whole of

the present passageway to the Spooner estate was in existence, and used by the occupants of estates abutting thereon as they had occasion.

Both parties claim under Hubbard, and the question is whether the latter, after he acquired title in 1825, extended the passageway to land of Spooner for the benefit of the plaintiff's lot, so that a right in the same passed by the deed or otherwise to the grantees of the plaintiff's lot. It is wholly a question of intention, to be ascertained from the language of the deeds under which the parties claim, interpreted with reference to what is indicated by the situation of the respective estates as necessary for their reasonable use and enjoyment. A deed in which the premises conveyed are bounded on a defined and existing passageway gives to the grantee by estoppel rights not only in that part which adjoins his own land, but also by necessary implication in such portion of the whole way as will make the same available and useful as an appurtenance to the estate granted. The extent of the grantee's rights beyond the limits of his land will depend upon the nature and character of the way, and its connection with the public streets, as affording a convenient outlet from his land. When the extent or limits of the way are defined in the deed by reference to a plan or otherwise, the estoppel is not confined to so much of the way as is necessary for the enjoyment of the granted premises, but extends to the whole way as defined. *Fox v. Union Sugar Refinery*, 109 Mass. 292. *Morgan v. Moore*, 3 Gray, 319. In *Thomas v. Poole*, 7 Gray, 88, a right was granted in a passageway described as extending from one monument to another, and an easement in the whole was held to have been given by the terms of the deed; and in *Rodgers v. Parker*, 9 Gray, 445, a plan was referred to in the deed showing the entire extent of the way in question.

In the case at bar, the passageway to the extent claimed by the plaintiff was not defined in the deed under which he claims, nor by reference to a plan showing that the whole passageway to the Spooner estate was laid out for the benefit of all the abutting lots. It was, as we have seen, laid out by different owners at different times, and not as a common passageway for a number of lots intended to be conveyed by the grantor to several different grantees. There was no evidence that the plaintiff,

or any tenants, occupants or persons resorting to his estate, had ordinarily any occasion, necessity or convenience, requiring them to pass over the passageway located west of his land.

The plaintiff's lot was conveyed by Amory to John Hubbard, in 1825, by a description which bounds it on the north by Court Street; on the east by the West Row lot; on the south by the lot at the corner of Howard Street and Stoddard Street which the grantor had previously conveyed to Hubbard; and on the west by land of Bedlington. Within the bounds thus given, there was at this time another passageway running southerly from Court Street to the rear of the lot, and the only reference in this deed to the passageway in question is in these words: "including in said bounds the passageway of five feet, as the same now runs from Court Street into another passageway running from Stoddard's Lane along the rear of my West Row estate."

After the death of Hubbard, his executors, in 1847, conveyed the lot on Court Street now owned by the plaintiff to George Hubbard, who conveyed the same in the following year to the plaintiff, by deeds both of which bounded the same "southeasterly by land formerly of John Amory, this line running through the middle of the brick wall between the granted premises and said estate late of John Amory, and extending from Court Street to a passageway about four and a half feet wide which runs in the rear of both estates to Stoddard Street; southwesterly on said passageway twenty-three feet to land of John Higgins" "with a right to the free use in common with others having rights therein of the said passageway leading to Stoddard Street." This description of the way, by the rules above stated, cannot be interpreted as showing anything more than an intention to grant a right over the old passageway to Stoddard Street, and not over its extension to the Spooner estate. This is decisive so far as the right of the plaintiff depends upon the deeds produced at the trial.

As to the prescriptive right claimed in this part of the way at the argument, it is sufficient to say, that the statement in the bill of exceptions, that from 1830 "it was used by the owners, tenants and occupants of the estates abutting thereon, and persons resorting thereto, as they had occasion, throughout the

whole extent thereof, from Stoddard's Lane to said Spooner's estate," cannot be fairly construed as a finding by the judge that the plaintiff had acquired by prescription the right now claimed. This is confirmed by the further consideration that the judge found that there was no evidence of the right of any person to enter upon said passageway from the Spooner estate, or to enter upon the Spooner estate from the same, or any evidence that the plaintiff or any tenants or occupants of his estate had ordinarily any occasion, necessity or convenience requiring them to pass over the passageway westerly from the plaintiff's estate. If such had been his finding, there would be no occasion for devoting so large a part of the bill of exceptions to a recital of the deeds under which the parties claim.

Exceptions sustained.

JOHN F. WOOD *vs.* BOYLSTON NATIONAL BANK.

Suffolk. March 11. — Sept. 10, 1880. ENDICOTT & SOULE, JJ., absent.

The owner of a negotiable promissory note, indorsed in blank by the payee, handed it to an attorney at law for collection. The attorney deposited it in a bank for collection, without stating for whose account. The bank collected it, credited the attorney with it, and applied the amount standing to his credit in part payment of the debt of the attorney to the bank. The attorney was subsequently adjudged a bankrupt, and the bank made a settlement with his assignees, in which the amount of the note was included. The owner of the note, a year after the settlement, but as soon as he knew that the bank had collected the note, made a demand upon the bank for the proceeds of the note. *Held*, that he could not maintain an action therefor against the bank.

CONTRACT for money had and received, to recover the amount collected upon a promissory note, dated August 7, 1874, signed by F. Guss, payable in nine months after date to the order of A. B. Savage & Co., and by them indorsed. The case was submitted to the Superior Court, and, after judgment for the plaintiff, to this court on appeal, upon agreed facts, which appear in the opinion.

F. W. Griffin, for the plaintiff.

H. G. Allen, (*N. Morse* with him,) for the defendant.

COLT, J. The plaintiff was the owner of the note, the avails of which he seeks to recover in this action. It was a negotiable note, indorsed in blank by the payee. Before it fell due, the plaintiff delivered it to Abraham Jackson, an attorney at law, for collection, and he deposited it, without his own indorsement, in the defendant bank, where he kept an account, for collection. At the time the note was left with the bank, and at the time of its maturity and payment, Jackson was owing the bank, for advances and otherwise, more than the amount of the note. Nothing was said when it was deposited, or before its payment, as to Jackson's title or relation to the note, and no advance of money was made to him on account thereof.

The bank credited Jackson's account with the amount of it when paid, on May 12, 1875, and applied the balance of his account to the payment of his debts to the bank. He was afterwards, on June 4, 1875, adjudicated a bankrupt; and the bank, on September 30, 1876, made a settlement with his assignees, crediting the amount of this note, and receiving but a part of the whole claim. The plaintiff, on September 20, 1877, as soon as he knew that the bank had received the proceeds of the note, made a demand upon the bank for the amount collected.

It is contended that there is nothing, on these facts, which shows that Jackson actually pledged, or intended to pledge, this note as security for his debt to the bank, or do more than give it to the bank to collect as agent for the plaintiff. But the effect of the transaction, as between Jackson and the bank, is to be determined by the application of well-settled legal principles. Jackson was the ostensible owner of the note. He delivered it to the bank in the usual course of business, with no notice expressed, or to be implied from the circumstances, that it was sent for collection only, or that any one else had any interest in it. No instructions as to the application of the proceeds were given. He knew that, in the regular course of business, it would be credited to his general account, to be availed of in that way as security to the bank. It has long been settled that a banker who has advanced money to another has a general lien on all securities of the latter which are in his hands, for the amount of his general balance, unless such securities were delivered to him

under a particular agreement limiting their application. *Bank of Metropolis v. New England Bank*, 1 How. 234, and 6 How. 212. *Sweeny v. Easter*, 1 Wall. 166. *Barnett v. Brandão*, 6 Man. & Gr. 630, and 3 C. B. 519. One who takes a negotiable promissory note before maturity, as security for a preëxisting debt, is by the law of this State a holder for value. *Culver v. Benedict*, 13 Gray, 7. Such being the law, the bank received the note, undertook its collection and applied the proceeds; and the unknown owner of it, who gave it to Jackson with all the appearance of title in him, cannot be permitted to defeat the right of the bank, who, long before it had knowledge of the claim, had applied the same to the payment of Jackson's debt, and settled with his assignees in bankruptcy. See *Locke v. Lewis*, 124 Mass. 1, and cases cited.

The case of *Lawrence v. Stonington Bank*, 6 Conn. 521, decided in 1827, and other cases of the same class, are plainly distinguishable from the one at bar. That was an action for the proceeds of a draft which had passed through a number of banks for collection merely; when received by the Stonington Bank, it was accompanied by a letter from the Eagle Bank, stating that it was for collection. The Stonington Bank knew of the failure of the Eagle Bank before the draft was paid. It gave no credit for or on account of it, and made no settlement with the Eagle Bank prior to actual notice of the plaintiff's title to the draft, and suffered no prejudice. In all cases of that class, we believe it will be found, on examination, that the bank had notice actual or constructive of the other party's claim, or had suffered no loss by reason of the delay in making known the claim.

Judgment for the defendant.

JOHN M. WAY vs. CLARK A. BATCHELDER.

Suffolk. March 11. — Sept. 10, 1880. ENDICOTT & SOULE, JJ., absent.

A memorandum written at the bottom of a promissory note, before delivery, which is repugnant and self-contradictory, is not a part of the contract, and need not be set forth in the copy of the note annexed to the declaration; and parol evidence is inadmissible to show what the parties intended by the memorandum.

CONTRACT upon a promissory note for \$26, dated September 13, 1878, signed by the defendant and payable in four weeks after date to the order of the plaintiff. Writ dated October 12, 1878.

At the trial in the Superior Court, before *Colburn*, J., the plaintiff put in the note, and rested his case. The note exhibited at the trial corresponded with the copy in the declaration, except that there was a memorandum at the bottom of the note at the left of the signature, as follows: "Due Oct. 12, Oct. 11," in ink.

The defendant requested the judge to nonsuit the plaintiff for the variance between the note exhibited and the copy in the declaration. But the judge ruled that the memorandum was immaterial, and no part of the note.

The defendant then offered to prove that the memorandum had been altered since the execution and delivery of the note, it having been originally as follows: "Due Oct. 11, Oct. 12," in pencil; that the parties had intended to date the note September 14, and discovered the error simultaneously with the signing, and after the first part of the memorandum, "Due Oct. 11," had been written; and that the plaintiff, before the delivery of the note, at his own suggestion and with the assent of the defendant, wrote after the words "Due Oct. 11" the words "Oct. 12," for the purpose of correcting the error in the date, and of signifying the agreement of the parties that the note should not become due and payable until October 12.

The judge ruled that this evidence was incompetent; and directed a verdict for the plaintiff. The defendant alleged exceptions.

F. T. Benner, for the defendant.

E. M. Bigelow, for the plaintiff.

AMES, J. It is true that if the parties to a written instrument see fit to add to it a memorandum containing words which qualify or restrain its operation, those words become a part of the contract. *Wheelock v. Freeman*, 18 Pick. 165. Thus it was held in *Heywood v. Perrin*, 10 Pick. 228, that a note purporting on its face to be payable on demand was changed into a note payable in one year, by the addition of a memorandum below the promisor's signature, by consent of parties, and before the delivery of the note.

The defendant says that the memorandum which was added to this note was originally written "Due Oct. 11," and that, for the purpose of correcting an error in the date of the note, it was altered by adding the words "Oct. 12." That is to say, his claim is that the memorandum should read, "Due Oct. 11, Oct. 12." But it is obvious that such a memorandum is repugnant and self-contradictory, and, for that reason, it is not to be considered as a part of the contract, or sufficient to contradict the terms used in the body of the note. Parol evidence as to what the parties meant by it would be inadmissible.

Exceptions overruled.

DAVID FLOYD vs. CHARLES S. TEWKSBURY & others.

Suffolk. March 11. — Sept. 10, 1880. ENDICOTT & SOULE, JJ., absent.

At the trial of a writ of entry, the demandant claimed under A. and the tenant under B., between whom a partition had been made in 1720, by a deed which described the dividing line as established "at two heaps of stones made on the sand near the beach bars;" the land north of that line being assigned to A., and the land south of the line to B. The monuments determining the location of the line having wholly disappeared or become uncertain, the demandant, in order to show where the "beach bars" had been, put in evidence a portion of a plan made use of by the commissioners upon a petition for partition filed in court, in 1805, by persons under whom the tenant claimed, and who were admitted by the demandant to have been the owners in fee of the land set off to B. in 1720. Upon this petition due proceedings were had, and the report of the commissioners who were appointed to make partition was accepted and confirmed by the court. *Held*, that the tenant might put in evidence the entire plan and record of the partition proceedings, and also the various deeds of the persons under whom he claimed, made after the partition in 1805 and before the year 1832, and referring to the partition.

WRIT OF ENTRY to recover a parcel of land in Winthrop. Plea, *nul disseisin*. Trial in the Superior Court, without a jury, before *Brigham*, C. J., who found for the tenants; and the demandant alleged exceptions to the admission of certain evidence, which is stated in the opinion.

F. T. Benner, for the demandant.

J. L. Thorndike, for the tenants.

AMES, J. The dividing line provided for in the partition deed of 1720, between John Grover and Joseph Belcher, is described in that deed as established "at two heaps of stones made on the sand near the beach bars;" the land south of that line being assigned to Belcher, under whom the tenants claim; and the land north of the line to Grover, under whom the demandant claims. In order to maintain the action, the demandant must prove that the premises claimed in the suit were upon the northerly side of the line. The monuments determining the location of that line having wholly disappeared, or become uncertain, the demandant, in order to show the location of the line, is called upon to show where the monuments had been. In order to show where the "beach bars" were situated, he was allowed, without objection from the tenants, to put in a portion of a plan, made use of by the commissioners upon a petition for partition filed in the Court of Common Pleas in 1805, by persons under whom the tenants claim, and who are admitted by the demandant to have been the owners in fee of the land set off to Belcher in 1720. Upon this petition due proceedings were had, and the report of the commissioners who were appointed to make partition was accepted and confirmed by the court. The plan accompanies their report, is referred to in it, and is a part of the record of the case.

The tenants claimed and were allowed, against the demandant's objection, to make use of the entire plan and record. We do not understand on what ground the demandant could select out a portion of the record, and exclude the other party from the use of the remainder. The record was made evidence in the case by the act of the demandant, and the tenants had a perfect right to use it for the purposes of their defence, so far as it could be so applied.

The tenants also had a right to put in evidence, as a part of

their chain of title, the various deeds of the persons who formerly, as they contended, were the owners of the Belcher portion of the property, and under whom they claimed. The partition and these deeds were evidence of acts of ownership on the part of the tenants' predecessors in the title, at and after the date of that partition in 1805, and before 1832; and we think they were properly admitted as such. They would furnish *prima facie* evidence, liable of course to be rebutted and disproved, but, in the absence of other evidence, they would raise a presumption of sufficient seisin in the grantors to enable them to convey, and, especially in transactions so ancient, would operate to vest the legal seisin in the grantees. *Ward v. Fuller*, 15 Pick. 185. *Whitman v. Boston & Maine Railroad*, 8 Allen, 133, 139.

The rulings of the presiding judge were therefore correct, and the demandant's

Exceptions are overruled.

JANE A. EATON vs. FITCHBURG RAILROAD COMPANY.

Suffolk. March 12. — Sept. 10, 1880. ENDICOTT & SOULE, JJ., absent.

In an action against a railroad corporation, under a declaration alleging that the plaintiff, while travelling on the highway, was injured at a grade crossing "by reason of the carelessness and negligence of the agents and servants of the defendant," the jury may consider whether, under all the circumstances of the case, the defendant was guilty of negligence in not having a gate or a flagman at the crossing, although never requested by the selectmen of the town, nor ordered by the county commissioners, to do so, under the St. of 1874, c. 372, § 128.

COLT, J. The first count in the plaintiff's declaration contains a general allegation that she was injured at a grade crossing while travelling in the highway, "by reason of the carelessness and negligence of the agents and servants of the defendant." It was admitted that the defendant corporation had never been requested by the selectmen, or ordered by the county commissioners or other persons having authority, to erect a gate or place a flagman at this crossing.

The judge ruled at the trial that, in passing on the question of the defendant's negligence, it was competent for the jury, under the declaration, to consider whether the defendant had used such reasonable care, in addition to the ringing of the bell and the blowing of the whistle required by the statutes, as the safety of travellers demanded at this particular crossing. There was much evidence introduced on this point, and the jury were permitted to view the premises.

This ruling is in accordance with the law as settled at an early day by this court, and as recognized in many decisions since. These cases all rest on the common law rule that, when there are different public easements to be enjoyed by two parties, at the same time and in the same place, each must use his privilege with due care, so as not to injure the other. The rule applies to grade crossings, because the traveller and the railroad each has common rights in the highway at those points. The fact that the Legislature has seen fit, for the additional safety of travellers, imperatively to require the corporation to give certain warnings at such crossings, does not relieve it from the duty of doing whatever else may be reasonably necessary. The statute makes positive regulations, and the defendant at its peril is bound to comply with them; but a compliance does not relieve it from any duty it was under before, and the defendant is still bound to take other precautions if necessary. It is sufficient to cite a few of the earlier and later cases. *Bradley v. Boston & Maine Railroad*, 2 Cush. 539. *Linfield v. Old Colony Railroad*, 10 Cush. 562. *Norton v. Eastern Railroad*, 113 Mass. 366. *Favor v. Boston & Lowell Railroad*, 114 Mass. 350.

But it is contended that, as the corporation had never been required, under the provisions of the Gen. Sts. c. 63, §§ 86-89, and the St. of 1874, c. 372, § 126, to erect a gate and employ a flagman at this crossing, the question whether such additional precautions should have been used should not have been submitted to the jury. The argument is that the Legislature has left it to the authorities named to determine as to their necessity. But the purpose of these provisions is to require imperatively the additional securities when, in the opinion of the selectmen and county commissioners, the provisions of the other statutes do not afford a sufficient protection. If no action is had, the corporation

is still under the rule which requires the exercise of reasonable care on its part; and the jury cannot be limited in their inquiries by the fact that a gate or a flagman has never been ordered, however proper it may be for them to take that fact into consideration. *Commonwealth v. Boston & Worcester Railroad*, 101 Mass. 201. The whole question of what other precautions were reasonably necessary being open to them, it is the duty of the jury to consider whether, although no gate or flagman had been ordered, it was not still the duty of the corporation to provide them.

It is not open to the defendant to object that this evidence was not admissible under the declaration. The allegation of negligence, in the first count, is broad enough to cover any omissions of duty on the part of any agent or servant of the corporation, of which evidence was offered, affecting the safety of this crossing. The declaration was not demurred to. If the allegation is too general, and the defendant desired a more specific statement of the negligence relied on, it should have applied for it before the trial. Gen. Sts. c. 129, § 58. *Oliver v. Colonial Gold Co.* 11 Allen, 283. If the defendant was surprised by the evidence offered at the trial, a delay should have been asked for. It is sufficient if facts enough were proved to establish a cause of action which has been informally stated. *Lee v. Kane*, 6 Gray, 495. *Clay v. Brigham*, 8 Gray, 161.

Judgment on the verdict.

E. D. Sohier, for the defendant.

W. Gaston & G. A. A. Pevey, (*F. A. Worcester* with them,) for the plaintiff.

ESTHER G. DAVIS vs. CENTRAL CONGREGATIONAL SOCIETY
OF JAMAICA PLAIN.

Suffolk. March 15. — Sept. 10, 1880. ENDICOTT & SOULE, JJ., absent.

If a religious society gives notice of a meeting to be held at its house of worship, and invites the members of other societies to attend, a member of a church so invited, while on the land of the society, is not a mere licensee, and may maintain an action against the society for a personal injury sustained, while in the exercise of due care, from the dangerous condition of the defendant's premises.

In an action against a religious society for a personal injury sustained by falling over a wall on the defendant's premises, there was evidence that there was a circular path, eighteen feet wide, leading from the defendant's meeting-house to the street; that one side of this path, as it approached the street, was bounded by a wall, which separated the defendant's land from a side street, and was two and a half feet high on the street; that the plaintiff, a woman, while going from the meeting-house, after dark, to the street, and walking in the manner in which she usually walked, struck her foot against the wall, at a point where it was about eight inches above the path, and fell over the wall into the side street, and was injured; and that the path was so insufficiently lighted that she did not see the wall. *Held*, that whether the plaintiff was in the exercise of due care, and whether the way was reasonably safe, were questions of fact for the jury.

TORT for personal injuries sustained by the plaintiff, by falling over a wall on the defendant's premises. Trial in the Superior Court, before *Gardner, J.*, who directed a verdict for the defendant, and reported the case for the determination of this court, in substance as follows:

On October 15, 1873, the defendant, a duly incorporated religious society, was the owner of a lot of land, with a meeting-house thereon, bounded northeasterly by Seaverns Avenue, and southeasterly by Elm Street, both public streets in Boston. A circular driveway or path, about eighteen feet wide, ran from near the corner of said street and avenue to the front doors of the meeting-house, and round to the street. This path was covered with concrete, and was smooth and level, and was the only means provided for access to and from Elm Street and the front doors of the meeting-house. The society maintained religious worship according to the usages of Congregational societies and churches. The church worshipping in the meeting-house was a voluntary association, united together by a covenant and articles of belief, and was a distinct body from the society, and had no

control of the premises. Joseph B. Clark was the settled pastor over the society and church, but was not a member of the society. The care and control of the premises were intrusted to a prudential committee of five, chosen by the society. The pastor and deacons of the church had the right to grant the use of the meeting-house for religious meetings and services not inconsistent with the rights and purposes of the society.

The plaintiff, in order to show that she was invited to attend a meeting held at the meeting-house, offered evidence tending to prove that a meeting of the Suffolk South Conference of Churches was held on the afternoon and evening of October 15, 1873, in the defendant's meeting-house; that this conference was a voluntary association of thirty or thirty-four Congregational churches in Boston and vicinity, including the church worshipping with the defendant society, and the church in Brighton, of which the plaintiff was a member; that this conference was a distinct organization from the several churches composing it, having its clerk, or scribe, and other officers; that, by the usages of this association, its meetings were held once in six months with the different churches composing it, each church taking its turn, the place of the next meeting being determined at the conference last held; that the meeting of the conference to be held in October 1873 should, by said usages, have been held with one of the other churches, and was actually appointed to be held at some other church, and not with the church worshipping with the defendant, but, the church at which the meeting was to be held being unable to have the conference, Joseph B. Clark, without consultation with the prudential committee or other officers of the defendant society, or with the deacons of the church, and without any consent on the part of the defendant, except such as may be inferred from the facts herein stated, gave permission to the scribe or other proper officers of the conference to hold the conference meeting at the defendant's meeting-house during the afternoon and evening of October 15, 1873, and the scribe, acting upon this permission, sent notices of the meeting to the several churches; that, in accordance with the usages of the conference, the notice contained a request that each church should choose two delegates to attend the meeting, and also contained a general invitation for the other members of the said several churches to

attend; that this notice was given from the pulpit of the church in Brighton, of which the plaintiff was a member, and in like manner in the defendant's meeting-house on the Sunday next before the meeting.

Evidence was also offered tending to prove that it was the custom for members other than delegates to attend such meetings; that the delegates and officers of the conference when assembled had charge of the meeting, voted, and transacted such business and conducted such services as came before the meeting; and that the plaintiff was not a delegate to the meeting. There was evidence tending to show that some of the members of the defendant's prudential committee, and some or all of the deacons, were present when the notice of the meeting was given in the defendant's meeting-house, and that no action was ever taken by the defendant society or its officers as to objecting or consenting to the meeting being held according to said notice.

The plaintiff testified that on October 15, 1873, in pursuance of the invitation or notice aforesaid, and the custom aforesaid, she went from her house in Brighton to attend the meeting; that she had no business with the defendant society or its officers, and was not a delegate; that she attended for her own benefit and as a visitor, and that she had been in the habit of attending conference meetings with which her church was connected for forty years; that she was never before at the defendant's meeting-house, and in going had to inquire the way there; that at about three o'clock that afternoon she entered the circular path at the corner of said avenue and street, and passed through the same and entered the front door of the meeting-house; that there was no difficulty in passing over the walk safely in the daytime; that she did not notice the wall or embankment in the afternoon, though there was nothing to prevent her seeing the same if she had looked, and that she remained within the meeting-house throughout the entire services, until the close thereof, at nine o'clock in the evening; that, at the close of the meeting in the evening, the plaintiff passed out of the front door, and as she was walking along the path towards the street, in the manner in which she usually walked, "not fast," she struck her right foot or leg against the wall, at a point where it was seven or eight inches high, and fell over the wall on to the sidewalk,

and was injured; that said path at the time was filled with people passing out, and there were many persons before and behind her, and on her right hand; that she did not see the wall before she fell. Three friends who were with her, testified that they did not see the wall, and neither of them hit or walked against it.

The plaintiff, in order to show that the defendant was guilty of negligence in the construction and maintenance of the path, and that the same was dangerous, offered evidence tending to prove that there was a bank wall two and one half feet high, extending the whole length of the northeasterly side of the defendant's land, the face of which wall formed the boundary line between the land and Seaverns Avenue; that the top of the wall was eighteen inches wide, and level; that the northeasterly line of the path, from the front door of the meeting-house to the point of its conjunction with said wall, was a curved line; that at the point of conjunction the walk and top of the wall formed a level surface; that from that point to the entrance to the premises the line of the path was a straight and descending line along the inner side of the wall, and formed an inclined plane; that at the point at which the plaintiff fell over the wall, the top of the wall was seven or eight inches higher than the path; that, at the time of the accident, there was no railing or other fence than the wall between the pathway and the avenue; that a railing or fence had been put there by the defendant since the accident; that the path was not lighted, except as far as it might be lighted from the gas-lights in the vestibule of the meeting-house, and a street gas-light, on the opposite side of Elm Street, about seventy feet distant, which has, since the accident, been moved by the city to the corner of said street and avenue.

The judge directed a verdict for the defendant. If the ruling was correct, judgment was to be entered on the verdict; otherwise, the verdict was to be set aside, and a new trial ordered.

H. C. Holt, for the plaintiff.

C. G. Keyes, for the defendant.

COLT, J. To maintain this action, it must be shown that the defendant corporation was chargeable with some neglect of duty which it owed to the plaintiff, by reason of which she suffered

the injury complained of. The injury was caused by falling over a wall by the side of a passageway leading from the street to the front entrance of the defendant's church edifice. It is alleged that this way was dangerous because of the failure of the defendant to provide by railing or other suitable protection against such an accident.

The owner or occupier of real estate is under no obligation to keep the premises safe for those who enter without inducement or invitation, express or implied, and the plaintiff must show that at the time of the injury she was passing over the way in question by the invitation of the defendant, and not by mere license or permission. The fact that the plaintiff was induced by the defendant to enter upon a dangerous place without warning, is the negligence which entitles the plaintiff to recover. *Sweeney v. Old Colony & Newport Railroad*, 10 Allen, 868. *Carleton v. Franconia Iron & Steel Co.* 99 Mass. 216. *Larue v. Farren Hotel Co.* 116 Mass. 67. *Severy v. Nickerson*, 120 Mass. 306.

The first question in the case is whether there was any evidence, which should have been submitted to the jury, that the plaintiff was induced by the express or implied invitation of the defendant to enter upon the premises.

It appears that the plaintiff attended in the evening a religious meeting in the defendant's house of worship, and on leaving, at its close, was injured in passing from the same to the street. The meeting which she attended was the meeting of a conference of congregational churches in the vicinity of Boston, which included the church connected with the defendant society, and also the church in Brighton of which the plaintiff was a member. This conference is an organization distinct from the religious societies of which it is composed, and its periodical meetings are held in the houses of worship of the different churches by turn. There was evidence that the meeting which the plaintiff attended was held in the defendant's church by the permission of the pastor, approved or ratified by the officers of the church and society, who had the care and custody of the building, and the right to grant the use of it for religious services of this description. It also appears that, in accordance with the usages of the conference, notices were sent to the several churches, containing a general invitation to all the members of the same to attend this meeting,

and that one of these invitations was read from the pulpit of the church in Brighton on the Sunday before.

This evidence would clearly justify a jury in finding that the plaintiff came by the defendant's invitation. The authority given by the defendant to the conference to hold its meeting in this place implied an authority to secure an attendance by invitations given in the known and usual manner, and it is unnecessary to inquire whether the construction of this passageway, thus obviously left open to the free use of all who might desire to attend religious service in the church, would not in itself imply such an invitation as would impose on the defendant the duty of making it reasonably safe to those who in the exercise of due care might use it.

The application of the rules on which the defendant's liability depends is not affected by the consideration that this is a religious society, and that the plaintiff came solely for her own benefit or gratification. It makes no difference that no pecuniary profit or other benefit was received or expected by the society. The fact that the plaintiff comes by invitation is enough to impose on the defendant the duty which lies at the foundation of this liability; and that too although the defendant in giving the invitation was actuated only by motives of friendship and Christian charity. In *Sweeny v. Old Colony & Newport Railroad*, above cited, the defendant was held liable, because the plaintiff was induced to enter upon a private crossing over the railroad, although he had no business with the corporation, and simply attempted to cross for his own convenience. And this defendant, as an incorporated religious society and as owner and occupier of the premises in question, is subject to all the duties and liabilities which are incident to the ownership and possession of real estate.

On the question whether the defendant was chargeable with neglect of duty in not providing a reasonably safe way to and from the church, we cannot say, as matter of law, that the construction, location and direction of the way, with the wall and declivity by its side, the want of a proper railing, and the insufficiency of light, would not justify a finding that in the night time it was unsafe for the use of a person exercising ordinary care and prudence. Nor can we say that the evidence shows conclusively

that the plaintiff was not in the exercise of due care. *Mayo v. Boston & Maine Railroad*, 104 Mass. 137. But the fact that this court considers the case as one proper to be submitted to the jury on these points is not to be taken as an indication of an opinion that the finding should be for the plaintiff. It is not a question here of the preponderance of evidence; and it is often the duty of the court to submit a question of fact to the jury, on the plaintiff's request, when the weight of evidence may appear to be against him.

New trial ordered.

ISAAC P. CLARKE & another vs. MARY E. PALMER.

Suffolk. March 17. — Sept. 10, 1880. AMES & LORD, JJ., absent.

A. held three mortgages on a parcel of land, and there was a fourth mortgage on the same, owned one third by B. and two thirds by C. B. assigned his one third to C., who agreed that he would account to B. for one third of the profits arising out of the sale of the estate. C. then foreclosed the mortgage, and became owner of the equity of redemption. Neither B. nor C. was liable for the payment of the notes secured by the three prior mortgages held by A. On a settlement of accounts between A. and B. arising out of other transactions, B. allowed A. to charge him with one third of the interest due on the three mortgage notes, thereby reducing A.'s debt to B. A. died, leaving a will in which his wife was appointed executrix and was the residuary legatee. She gave bond in common form, and not to pay debts and legacies. After A.'s death, B. charged in his books the balance of A.'s debt to A.'s estate, and, in 1874, so informed A.'s wife, and also told her that he would allow, as a set-off against this debt, one third of the interest falling due on the three mortgage notes, so long as C. continued to pay his two thirds of the same. This arrangement was carried out, and the interest was so indorsed on the notes until 1877, leaving a considerable balance then due B. from A.'s estate. A.'s wife rendered her final account as executrix in 1874, by which it appeared that the balance was paid to her as residuary legatee, and in this balance were included the three mortgage notes. *Held*, that she was not liable in equity to B. for her husband's debt.

ENDICOTT, J. This is a bill in equity, which as originally brought sought to restrain the defendant from selling certain real estate, under a mortgage assigned to her as collateral security for a note of \$1500, signed by George F. Clarke, one of the plaintiffs, and guaranteed by Isaac P. Clarke, the other plaintiff

The bill also prayed for an account, and that the plaintiffs might redeem; and alleged that the sum of \$1500 was lent by the defendant to Isaac P. Clarke, and that he had rendered services to the defendant, in the settlement of the estate of her late husband, William W. Palmer, of which estate she was the executrix under the will; and that she agreed that the charges due for these services should be set off against the amount due upon the note.

The master has found the value of these services, and, after allowing the same, he finds that there is due to the defendant on the note the sum of \$967.75. To this finding no exception is taken by either party.

While the case was pending before the master, the plaintiffs filed an amendment to their bill, in which they alleged that William W. Palmer was, at the time of his death, in February 1874, indebted to Isaac P. Clarke in the sum of \$2059, and that the defendant agreed to assume and pay this sum; that a portion had been paid since the death of William W. Palmer, and that the balance remaining due should be allowed in settling the amount due upon the note for \$1500. It is not contended that the defendant ever executed any agreement in writing by which she promised to pay, out of her own estate, the sum thus alleged to be due from the estate of which she was the executrix. Gen. Sts. c. 105, § 1. This would seem to be fatal to the claim against the defendant; but, as the plaintiff contends that she is liable, upon the facts found by the master, on other grounds, it becomes necessary to deal with the facts as presented.

On this branch of the case, it appears from the master's report that William W. Palmer, some time previous to his death, held three mortgages on a certain parcel of real estate; and that there was a fourth mortgage on the same, in which Isaac P. Clarke held one third interest, and Moses Pond the other two thirds. This one third Clarke assigned to Pond, who gave to Clarke an agreement that he would account to him for one third of the profits arising out of the sale of the estate. Pond then foreclosed the mortgage, and became owner of the equity of redemption. Neither Pond nor Clarke was liable for the payment of the notes secured by the three prior mortgages held by Palmer.

On a settlement of accounts between Isaac P. Clarke and William W. Palmer in October 1878, arising out of other transactions, Clarke allowed Palmer to charge him with one third of the interest due on the three mortgage notes, thereby reducing Palmer's indebtedness to Clarke, so that, at the time of Palmer's death, the master finds he was indebted to Clarke in the sum of \$2059. After Palmer's death, Clarke charged this sum in his books to the estate of Palmer, and he so informed the defendant in the winter or spring of 1874; and, at the same time, told her that he would allow as a set-off against this sum one third the interest falling due on the three mortgage notes, so long as Pond continued to pay his two thirds of the same. This arrangement was carried out, and the interest was so indorsed on the notes until February 1877, leaving a considerable balance then due Clarke from the estate, as found by the master, which the plaintiffs contend should be set off against the amount found due on the note of \$1500. At the time this proposal was made, in pursuance of which the interest was afterwards indorsed on the notes, the defendant held the notes as executrix; she rendered her final account in June 1874, by which it appears that the balance was paid to her as residuary legatee under the will; and in this balance were included the three mortgage notes, and, after she thus held the notes, interest was indorsed until February 1877. The defendant gave bond as executrix in common form, and gave no bond as residuary legatee to pay debts and legacies.

We do not find in these facts any ground for holding that the estate of W. W. Palmer was no longer liable for this debt, and it does not appear that Clarke, in any manner, released his claim against the estate. Nor was Clarke under any legal obligation whatever to continue the allowance of one third interest on the mortgages in reduction of the debt; and it was part of his proposal, that he would allow one third only so long as Pond paid the other two thirds.

The master has found that the defendant never admitted that the debt was a valid claim against the estate, and never agreed orally or in writing to assume it, to which findings the plaintiff has excepted. The evidence is reported, and we cannot say the master's finding that she never orally agreed to assume it is erroneous. Nor is there any evidence that she ever admitted

that it was a valid claim against the estate, except by allowing one third of the interest on the notes to be indorsed thereon in reduction of the alleged debt. All that Isaac P. Clarke testified before the master in relation to the agreement was this: "I told Mrs. Palmer that I would allow, as an offset against that, (the debt from the estate,) one third of the interest on the mortgages, so long as Pond paid his interest on the two thirds; that in my settlement with Mr. Palmer I had allowed him interest on the three mortgages up to that settlement, and I would continue it on. She agreed to it." The defendant denies that she agreed to it, but admitted that the interest was indorsed, as stated above. This occurred while she was executrix.

There is no evidence that she made any agreement on the subject, oral or written, after she received the mortgages and notes, as residuary legatee under the will. The fact that, after that time, she allowed the interest to be indorsed upon the notes, cannot be taken as a promise in law by her to assume the debt due from the estate; whatever may be the effect of her making, or allowing the same to be made, when the question arises what is due on the mortgages, or what is due from the estate to Clarke. Such indorsements thus made cannot be held to be equivalent to an assumption of a debt due from the estate, any more than they could be held to impose upon Clarke an obligation to pay one third of the three mortgage notes. It would be inequitable thus indirectly to place this burden upon her, while Clarke had assumed no legal obligation to pay his proportion of the mortgages and interest, and had only undertaken to pay one third the interest thereon while Pond continued to pay the other two thirds.

We cannot, therefore, hold that the Gen. Sts. c. 105, § 1, have no application to this case, because, on the facts disclosed, the defendant had a fund in her hands from which she was bound to pay this debt due from the estate. The exceptions to the report of the master were properly overruled, and a decree must be entered that the plaintiff may redeem on paying the sum found due by the master on the note of \$1500.

Decree accordingly.

E. M. Johnson, for the plaintiffs.

E. B. Callender, for the defendant.

NATHANIEL DAVIS vs. CITY OF BOSTON.

Suffolk. March 18. — Sept. 10, 1880. AMES & LORD, JJ., absent.

Real estate in the possession of a mortgagee, the equity of redemption of which had been conveyed, was improperly taxed to the mortgagor. It was afterwards sold and conveyed under a power of sale in a second mortgage; and the tax was subsequently reassessed, under the Gen. Sts. c. 11, § 53, to the holder of the equity, based upon a valuation other than that of the year for which the tax was originally assessed. *Held*, that the reassessment was invalid.

If land is sold for a tax improperly assessed, the true owner, if in possession, may maintain a bill in equity against the purchaser at the tax sale, to quiet his title.

BILL IN EQUITY, filed June 20, 1879, to quiet the plaintiff's title to land in Boston. At the hearing before *Ames, J.*, the following facts appeared:

On July 1, 1871, Nathaniel Winsor, then the owner of a wharf, in Boston, mortgaged the same by deed of that date, duly recorded, to Francis Curtis and others, for \$95,000; and, on January 1, 1875, he made a second mortgage of the same estate, by deed duly recorded, to the plaintiff, for \$30,000. On August 17, 1875, Winsor, by an indenture duly recorded on December 15, 1875, conveyed to Edward S. Tobey and others, trustees, in trust for his creditors, all his real estate, including the said wharf, subject to the above-named mortgages. On May 1, 1876, the assessors of the defendant city assessed to Nathaniel Winsor the sum of \$1873.25, as a tax on the said wharf, at a valuation of \$147,500. The trustees were at the time of this assessment the record owners of the estate, and, by their consent, the first mortgagees were in possession, taking the rents and profits thereof. On May 21, 1877, after a breach of the condition of the second mortgage, the plaintiff duly entered upon said estate and took peaceable possession thereof, for the purpose of foreclosing his mortgage. The certificate of his entry, dated May 21, 1877, was duly recorded within the time prescribed by law, and on May 21, 1877, under the power of sale contained in his mortgage, he duly sold and conveyed said estate, by deed, duly recorded with affidavit of sale, to Joshua N. Marshall, who, on May 31, reconveyed the estate to the plaintiff by deed dated and

recorded the same day; and the latter has ever since been in possession of the estate as the owner thereof. In the above transactions, Marshall acted merely as a conduit for the purpose of effecting a foreclosure; and the plaintiff, by said foreclosure, obtained a valid title to the estate, and became the legal owner thereof. On July 11, 1877, the assessors of Boston, by a reassessment, assessed to Edward S. Tobey and others, trustees, as a tax for the year 1876, upon said estate, the sum of \$1587.50, at a valuation of \$125,000. On August 29, 1878, the collector of taxes sold said estate for non-payment of the above tax, so reassessed; and, on September 23, 1878, by deed duly recorded, conveyed the estate to the city. All the above proceedings were proper in form. No proceedings were ever had or commenced by the city to enforce the collection of the tax assessed to Winsor, or to preserve or enforce the lien, if any, therefor.

Upon these facts, the judge ordered the collector's deed to the defendant to be set aside, as constituting a cloud upon the plaintiff's title; and that the defendant convey to the plaintiff all right, title and interest in the estate which it acquired under said deed. The defendant appealed to the full court.

J. N. Marshall & M. L. Hamblet, for the plaintiff.

H. B. Sargent, Jr., for the defendant.

SOULE, J. On May 1, 1876, Curtis and others, the first mortgagees of the land described in the plaintiff's bill, were the only persons to whom the tax on that land could be legally assessed, because they were mortgagees in possession. Gen. Sta. c. 11, § 8. The original tax for the year 1876 was therefore void, because it was not assessed to the proper person. A reassessment of the tax was within the authority of the assessors for the year 1877, if made in the just amount and to the person to whom the tax ought at first to have been assessed. Gen. Sta. c. 11, § 53. The attempted reassessment was invalid, because it was made to Tobey and others, the owners on the 1st of May, 1876, of the equity of redemption, instead of to Curtis and others, the mortgagees in possession. The statute on this point is explicit. The reassessment was invalid for the further reason that it was not based on the valuation of the year for which the tax was originally assessed. It was not, therefore, a reassessment of a tax which was void by reason of irregularity in assessing it to the

wrong person, but was a new and original tax, assessed without authority. *Hubbard v. Garfield*, 102 Mass. 72.

But if this were not so, and the tax were legally reassessed, it did not constitute a lien on the land, and the collector had no authority to make sale of the land to enforce its collection.

When the tax was originally assessed, Tobey and others owned the land subject to two mortgages. Afterward, and before the reassessment, the land was sold under a power of sale contained in the second mortgage, and a valid absolute title was conveyed to the plaintiff, who was also the second mortgagee. This was an alienation of the estate which was in Tobey and others, leaving in them no title or interest whatever. *Hall v. Bliss*, 118 Mass. 554. If, therefore, Tobey and others were the persons to whom the tax ought originally to have been assessed, as owners of the land, a tax reassessed to them after a sale which extinguished their title, could not constitute a lien on the land, under the statute which provides that reassessed taxes on real estate shall constitute a lien thereon from the time they are committed to the collector, unless the estate has been alienated between the first and second assessments. Gen. Sts. c. 12, § 23.

The proceedings of the collector in selling and conveying the land were therefore unwarranted, and his deed to the defendant did not convey a valid title. But, as the defendant has caused the deed to be recorded, and refuses to release to the plaintiff, and claims title to the land, the collector's deed to it constitutes a cloud on his title. As he is in possession, he cannot try his title by writ of entry, and may maintain this bill to remove the cloud from it. He is entitled to a deed of release from the defendant, and to recover his costs. *Clouston v. Shearer*, 99 Mass. 209. *Russell v. Deshon*, 124 Mass. 342.

Decree affirmed.

TIMOTHY TUFTS vs. GEORGE A. TAPLEY & others.

Suffolk. March 22. — Sept. 10, 1880. AMES & LORD, JJ., absent.

A. conveyed land to B. and took an agreement from him by which he was to reconvey the land on the performance by A. of certain conditions in a certain time. B., after this time had expired, sold the land to C., who made expensive improvements on the land. C. did not have actual knowledge of the agreement between A. and B.; and A., though he knew of the sale, did not disclose his interest in the land, and by his conduct and statements induced C. to believe that B. had a right to sell. *Held*, that, even if the relation between A. and B. was that of mortgagor and mortgagee, A. was not entitled to the aid of a court of equity to enable him to redeem.

BILL IN EQUITY, filed March 22, 1879, against George A. Tapley, Amos Tarleton and Lewis B. West, alleging that, on April 1, 1859, the plaintiff, who then owned certain parcels of land in Chelsea, conveyed the same, by deed absolute in form, and recorded on March 2, 1861, to Tapley, subject to two mortgages, one to Samuel Bigelow for \$9000, and the other to said Tapley for \$10,000; that, at the time of the deed to Tapley, the plaintiff and Tapley executed an agreement under seal, dated April 1, 1859, and duly recorded on July 20 of that year, by the terms of which Tapley agreed with the plaintiff to procure the extension of the mortgage of \$9000, which was then due, to take the superintendence of a hotel on the land conveyed, at a salary of \$600 a year, to receive all moneys paid by the customers of the hotel, pay the expenses of keeping the same, and out of the net receipts pay taxes, insurance and interest on the mortgages, and the principal of the mortgage for \$9000. The agreement further provided that, as soon as the last-named mortgage was paid, Tapley should reconvey the premises to Tufts subject to the mortgage for \$10,000; that Tufts might at any time pay the mortgage for \$9000, or furnish a guaranty to Tapley that it should be paid, and thereupon the estate should be conveyed to Tufts; that "in case said receipts shall not be sufficient to pay said mortgage as hereinbefore provided within three years and six months from this date, and said Tufts shall fail to pay the same during that time, then this agreement shall become null and void, and said Tapley, his heirs or assigns, shall hold said estate absolutely."

The bill further alleged that Tapley, on June 22, 1864, conveyed the estate to the defendants Tarleton and West free of all incumbrances except the mortgage of \$9000 to Bigelow; that this mortgage and the mortgage to Tapley had been paid out of the profits of the hotel; that Tarleton and West were in the employ of Tapley at the time the plaintiff conveyed the estate to Tapley, and remained in his employ until they purchased the estate, and were cognizant of all the relations between the plaintiff and Tapley.

The prayer of the bill was for an account; and that the plaintiff be allowed to redeem the estate.

Annexed to the bill were copies of the deeds and mortgages, and of the agreement between the plaintiff and Tapley, and annexed to this agreement was an assignment of the same by the plaintiff to Emerson Wheeler, dated July 20, 1859, and recorded the same day.

The defendant Tapley filed an answer admitting the execution of the deed and agreement, and averring the non-performance of the conditions of the agreement by the plaintiff; and also pleaded the statute of limitations. The other defendants filed an answer denying that they knew of the agreement between the plaintiff and Tapley until long after their purchase of the estate, and set up certain representations made to them by the plaintiff at the time of their purchase and afterwards.

The case was heard on the pleadings and proofs, by *Morton, J.*, who ordered a decree to be entered dismissing the bill; and the plaintiff appealed to the full court. The nature of the evidence, so far as material to the point decided, appears in the opinion.

E. R. Hoar & *A. R. Brown*, for the plaintiff.

E. Merwin, (*C. W. Bartlett* with him,) for the defendants.

SOULE, J. It is unnecessary for us to decide the question, which was much discussed at the argument, whether the deed from the plaintiff to Tapley, with the contract between Tapley and the plaintiff, constituted a mortgage, or an absolute conveyance and a contract for a repurchase on conditions which were not fulfilled by the plaintiff. If the sale was absolute, the plaintiff has lost all rights under the contract for a reconveyance, by failing to pay the amount called for by its terms within the time specified.

Flagg v. Mann, 14 Pick. 467. 2 White & Tudor Lead. Cas. Eq. (4th Am. ed.) 1995, and cases cited. If the transaction was a mortgage, it has never been foreclosed by any formal proceedings which have been proved, but the plaintiff is not entitled to redeem. The defendants Tarleton and West purchased the land described in the bill, in good faith, from the defendant Tapley, supposing that he had the absolute title and the right to convey it, and without notice, that the plaintiff had any right in the premises. They bought it nearly fifteen years before the filing of the plaintiff's bill, and have ever since occupied the premises as owners, and have expended in improvements on it a sum nearly or quite equal to the purchase money. Some eight, ten or twelve years ago, the plaintiff expressed to the defendant Tarleton his satisfaction in the fact that Tarleton and West had got the property, so that Tapley would never get any benefit out of it. This statement was inconsistent with the idea that the title of Tapley and of the defendants, his grantees, was that of mortgagees only, because a mortgagee is not entitled to any benefit from the property mortgaged except as security for his debt. The plaintiff did not at this time assert any claim to or interest in the premises. His conduct was of a nature to confirm Tarleton's belief that the plaintiff had ceased to have a right to a reconveyance of the property, before the sale by Tapley. Relying on the assurance of Tapley at the time of the sale, and on the impression conveyed by the conversation of the plaintiff, Tarleton and West made large outlays in improving the premises; and some six or eight years after the conversation already referred to, the plaintiff in a conversation with Tarleton commended the improvements, and expressed surprise that they had not been made before. This is wholly inconsistent with the idea that he regarded the defendants as mere mortgagees, as nothing could be more unwise on the part of mortgagees than to expend money in making improvements on the mortgaged property, because they would not be entitled to exact compensation therefor, in case of payment of the mortgage debt and extinguishment of the mortgage.

If, therefore, we assume that Tapley was a mortgagee only, and could not convey a valid title as against the plaintiff's right to redeem, the conduct of the plaintiff, who knew of the

purchase by the defendants Tarleton and West, in concealing his title from them, and giving them reason to infer that he had no interest in the premises, and to believe that their title was perfect against him, followed by large outlays by the defendants in permanent improvements on the property, estops him to set up his right to redeem the mortgage. Though his right to redeem remains as an existing estate, on paper, a court of equity will not under such circumstances aid him to redeem the land from the mortgage, to the great injury of the innocent tenants of the premises. He will not be allowed to profit by their mistakes, caused by his misrepresentations and concealment. *Fay v. Valentine*, 12 Pick. 40. *McSorley v. Larissa*, 100 Mass. 270.

We have discussed this question as if the paper title, under which the plaintiff claims, had been in him all the time since the agreement was made in 1859, because we are satisfied on the evidence that the conveyance by the plaintiff to Wheeler was colorable merely, and that the paper title was held by Wheeler for the benefit of the plaintiff. *Decree affirmed, with costs.*

SAMUEL A. STODDARD & another vs. JOSEPH HAM.

Suffolk. March 23. — Sept. 10, 1880. AMES & LORD, JJ., absent.

If A. sells goods to B., who sells them to C., the fact that A. supposed he was selling the goods to C. through B. as his agent, and would not have sold them to B. on his sole credit, will not entitle A. to maintain an action against C. for the conversion of the goods.

TORT for the conversion of a quantity of bricks. Answer, a general denial. Trial in the Superior Court, without a jury, before *Pitman, J.*, who reported the case for the determination of this court upon the following facts found by him :

The plaintiffs were manufacturers of and dealers in bricks, at Bangor, Maine. The bricks in question were there purchased of the plaintiffs by Charles E. Leonard, who did a commission business in that city, but sometimes bought on his own account.

The plaintiffs supposed they were selling these bricks to the defendant through Leonard as his agent; and they were sold on the credit of the defendant solely, and would not have been sold on the personal credit of Leonard; but Leonard was not the agent of the defendant in this purchase, and had no authority to bind him. Leonard was not guilty of any false representations as to agency; and it was a case of error and mistake on the part of the plaintiffs as to the principal with whom they were dealing.

The bricks were bought upon short credit, and were immediately sold by Leonard to the defendant, at a fixed price delivered in Boston, and were, in fact, bought with a view to such sale. The bricks remained in the plaintiffs' yard and possession until after the sale by Leonard to the defendant, and were afterwards delivered by the plaintiffs at a wharf in Bangor, as directed by Leonard, and by him shipped to the defendant, Leonard taking the bills of lading in his own name. Leonard sold other bricks to the defendant, at or about the same time, and drew drafts against the aggregate cargoes, which were accepted and paid by the defendant, who also paid the freight on account of Leonard. From the proceeds, certain payments were made by Leonard to the plaintiffs, who supposed that they were made on the defendant's account, and they were credited to the latter. After the bricks were all delivered, Leonard failed in business, and no other payments were made. Leonard was largely indebted to the defendant, and he offset the claim of Leonard for the balance due him on the bricks by this antecedent indebtedness. After Leonard stopped payment, the plaintiffs made due demand on the defendant for the bricks, contending that they had never parted with the property in them, if the defendant repudiated the agency of Leonard; and offered to repay the defendant for all advances and expenses incurred by him; but the defendant refused to deliver them, and claimed to hold by purchase from Leonard. At the time of the demand, the defendant had on hand some of the bricks which came from the plaintiffs' yard the others had been sold and delivered by the defendant as they arrived.

Upon these facts, the judge ruled, as matter of law, that the plaintiffs could not recover; and ordered judgment for the

defendant. If the ruling was right, judgment was to be entered for the defendant; otherwise, the case to stand for a new trial.

S. H. Tyng, for the plaintiffs.

N. Morse, for the defendant.

COLT, J. This case was tried without a jury, and there is no reason to doubt that, upon the facts found by the judge, it was correctly ruled that the plaintiffs could not recover in tort for the conversion of the property in dispute.

It is not enough to give the plaintiffs a right to recover, that they supposed they were selling bricks to the defendant, through Leonard his agent, and that they would not have sold them to Leonard on his sole credit. The judge found that they were in fact sold to Leonard. There was no fraud, no false representation of agency, or pretence on the part of Leonard that he was buying for any one else. He was a commission merchant, who was in the habit of purchasing goods on his own account, and who honestly bought the bricks for himself, and sold them to the defendant as his own. It was not a case of mistaken identity. The plaintiffs knew that they were dealing with Leonard; they did not mistake him for the defendant; nothing was said as to any other party to the sale. The conclusion is unavoidable that the contract was with him. The difficulty is, that the plaintiffs, if they had any other intention, neglected then to disclose it. It was a mistake on one side, of which the other had no knowledge or suspicion, and which consisted solely in the unauthorized assumption that Leonard was acting as agent for a third person, and not for himself.

It is elementary in the law governing contracts of sale and all other contracts, that the agreement is to be ascertained exclusively from the conduct of the parties and the language used when it is made, as applied to the subject matter and to known usages. The assent must be mutual, and the union of minds is ascertained by some medium of communication. A proposal is made by one party and is acceded to by the other in some kind of language mutually intelligible, and this is mutual assent. Mot. Con. 14. A party cannot escape the natural and reasonable interpretation which must be put on what he says and does, by showing that his words were used and his acts done with a

different and undisclosed intention. *Foster v. Ropes*, 111 Mass. 10, 16. *Daley v. Carney*, 117 Mass. 288. *Wright v. Willis*, 2 Allen, 191. 2 Chit. Con. (11th Am. ed.) 1022. It is not the secret purpose, but the expressed intention, which must govern, in the absence of fraud and mutual mistake. A party is estopped to deny that the intention communicated to the other side was not his real intention. To hold otherwise would be to put it in the power of the vendor in every case to defeat the title of the vendee, and of those holding under him, by proving that he intended to sell to another person, and so there was no mutual assent to the contract.

In *Boston Ice Co. v. Potter*, 123 Mass. 28, cited by the plaintiffs, there was no privity of contract established between the plaintiff and the defendant. There was no evidence afforded in the conduct and dealings of the parties, that the defendant assented to any contract whatever with the plaintiff. A stranger attempted to perform the contract of another party with the defendant.

In *Hardman v. Booth*, 1 H. & C. 803, there was abundant evidence that the contract was with another party, to whom the goods were sent, and not with the person who obtained possession of them and sold them to the defendant. In *Mitchell v. Lapage*, Holt N. P. 253, the goods were expressly bought of a firm, which, without the knowledge of the broker, had been dissolved by the withdrawal of two of its members.

We are referred to no case which supports the claim here made by the plaintiffs. *Judgment for the defendant.*

EDWIN L. SANBORN vs. WILLIAM RICE.

Suffolk. March 11. — April 6, 1880. ENDICOTT & SOULE, JJ., absent.

SAME vs. SAME.

Suffolk. March 16. — Sept. 11, 1880. AMES & LORD, JJ., absent.

The owner of a large tract of land divided it into lots, shown on a plan, and conveyed one lot, rectangular in shape, bounding it beginning at a certain distance from the westerly corner of a fence around a distant lot, and thence by a line running around the lot conveyed, the courses and distances of which were given. The deed also contained a condition that the front line of the house should be a certain distance from the street on which it bounded; a condition that the house should occupy the entire width of the lot; and a recital that the house then on the lot was in compliance with these conditions. An adjoining lot was conveyed to the same person by a deed containing a similar description, and similar conditions and recitals. The grantee then conveyed the first lot, using the same description as in the deed to him. *Held*, that his grantee had title to the centre of the partition wall between the two estates, even though the effect of measuring from the fence of the distant lot would be to place the whole of the partition wall in the second lot.

A lot of land twenty-one feet wide was conveyed subject to the condition that the front line of the building should be fifteen feet from the street on which the land bounded, and the deed recited that the building then on the land conformed to the condition. The front line of the building thus referred to was straight. Subsequently the owner built a rectangular addition to the front, eight or nine feet wide and projecting three feet and three inches towards the street. This structure began four feet above the ground and extended to the top of the building. *Held*, that there was a violation of the condition.

A deed of a lot of land, bounded on a street, contained a condition that "no dwelling-house or other building shall be erected on the rear of said lot." The deed also stated that the building then on the land conformed to the condition. *Held*, that there was no ambiguity as to what was meant by the rear of the lot, although the same condition had been inserted in an agreement for a deed made when the land was vacant.

THE FIRST CASE was an action of tort for breaking and entering the plaintiff's close in Boston. Writ dated May 28, 1878. Trial in the Superior Court, before *Colburn, J.*, who reported the case for the determination of this court, in substance as follows:

The plaintiff and the defendant are owners of adjoining estates on Rutland Street, on each of which is a brick house covering the entire width of the lot, with a partition wall between them eight inches thick. The plaintiff contended that the division line between the two estates was the centre of this partition

wall. The trespass complained of was a wall built by the defendant, in January 1878, on this partition wall, which covered the entire space of eight inches in front, and ran at an acute angle towards the rear, and there extended a little beyond the centre line.

The city of Boston, before 1858, owned a tract of land on the northeasterly side of Rutland Street, and divided it up into eighteen lots, which were shown on a plan, and numbered from 1 to 18. On January 1, 1858, the city conveyed the lot now occupied by the plaintiff to William E. Blanchard, by deed as follows: "Beginning at the southerly corner of the said land, being a point in the northeasterly line of Rutland Street, distant two hundred and thirty feet northwestwardly from the westerly corner of the brick fence of the primary school-house lot, thence running northwestwardly, bounded by Rutland Street, twenty-one feet; thence northeastwardly, parallel to Newland Street, ninety feet; thence southeastwardly, bounded by a passageway twenty feet wide running parallel to Rutland Street, twenty-one feet; and thence southwestwardly, parallel to Newland Street, ninety feet, to the point of beginning; containing eighteen hundred and ninety square feet, more or less. Being lot numbered 12 on a plan recorded with plans of city lands sold, book 2, leaf 79, in the office of the superintendent of public lands. It is understood that this conveyance is given and accepted in full performance of a certain agreement, dated May 1, 1857, given by the said city of Boston to the said William E. Blanchard. And this conveyance is also subject to the following conditions: 1. All taxes and assessments which have been laid or assessed upon the said premises previous to the execution of this conveyance shall be paid by the said William E. Blanchard, his heirs and assigns. 2. The front line of the building which may be erected on the said lot shall be placed on a line parallel with and fifteen feet back from the said Rutland Street. 3. The building which may be erected on the said lot shall be of a width equal to the width of the front of the said lot. 4. No dwelling-house or other building except the necessary out-buildings shall be erected or placed on the rear of the said lot. 5. No building which may be erected on the said lot shall be less than three stories in height exclusive of the basement and attic,

nor have exterior walls of any other material than brick, stone or iron, nor be used or occupied for any other purpose or in any other way than as a dwelling-house during the term of twenty years from October 1, 1857. It is understood that the building at present erected upon the said lot is constructed in conformity with the above conditions, and is satisfactory to the said city of Boston."

In June 1858, Blanchard conveyed this lot of land "with the new brick dwelling-house thereon standing" to Richard C. Cabot, through whom by mesne conveyances it came to the plaintiff in 1873. All of these deeds used the same language, in describing the boundaries of the land, as the deed to Blanchard, and conveyed the land subject to the conditions contained in that deed, but did not more specifically set them forth.

The defendant derived title to his lot through a deed from the city of Boston to William E. Blanchard, dated May 14, 1858, which bounded and described it as follows: "Beginning at the southerly corner of the said land, being a point in the northeasterly line of Rutland Street, distant two hundred and fifty one feet northwestwardly from the westerly corner of the brick fence at the primary school-house lot; thence running northwestwardly, bounded by Rutland Street, twenty-one feet; thence northeasterly, parallel to Newland Street, ninety feet; thence southeastwardly, bounded by a passageway twenty feet wide, running parallel to Rutland Street, twenty-one feet; and thence southwestwardly, parallel to Newland Street, ninety feet, to the point of beginning; containing eighteen hundred and ninety square feet, more or less. Being lot numbered 13 on a plan recorded with the plans of city lands sold, lib. 2, fol. 79, in the office of the superintendent of public lands." The deed also stated that the conveyance was given and accepted in full performance of an agreement, dated May 1, 1857, of the city of Boston with Blanchard; and that the conveyance was also subject to certain conditions, which were set forth at length, and were the same as in the preceding deed to Blanchard, and contained the same recitals.

On September 28, 1858, Blanchard conveyed lot 13 to Owen Bearse, by deed which described the two side lines as running "to and through the centre of the brick partition wall"; and

the description was the same in the subsequent deeds through which the defendant claimed title.

The plaintiff put in evidence the plan of the land referred to in the deeds of the plaintiff and of the defendant. The house of the plaintiff was occupied by him from September 10, 1873; and he was in occupancy of the same at the time when the acts complained of were done. The house, as constructed and existing at this time, occupied the ground to the centre of the partition wall, and was numbered 67, and the defendant's house, as constructed and existing at the same time, occupied the land to the same centre line, and was numbered 69; each of them as thus located measuring twenty-one feet as the width of the houses respectively, including one half of the partition wall.

A surveyor called by the plaintiff testified that all of the lots shown on the plan are now covered with brick houses, contained in one block of the width indicated by the plan, the plan being made upon a scale shown thereon; that the house 67 stood on lot 12, as shown by said plan; that to fix the line between lots 12 and 13, he commenced at the line of Shawmut Avenue, as given to him by the city surveyor, and measured off five hundred and thirty-one feet and six inches, and this brought the centre of the wall of the houses on lots 12 and 13 into lot 12. On cross-examination, he stated that two hundred and fifty-one feet from the southwest corner of the school-house fence falls short of the side of the wall, between lots 12 and 13, by one and three fourths inches; that the school-house fence is six and three fourths inches inside of the school-house lot, as shown on the city plan; that from the brick fence of the school-house lot to the nearest house on the northwesterly side is three feet eleven and one half inches; that there was nothing on the ground to show the line of the school-house lot except the brick fence; that he could not locate the plaintiff's lot satisfactorily by the city plan; that he located it by information from other sources; that he did not know of the brick wall of the school-house lot ever being changed in location, since it was first named or referred to in any of the deeds in evidence; but it did not appear that he was acquainted with the premises until quite recently, when this controversy arose, and there was no other evidence as to where it stood at the time referred to in said deeds, except so far as this may

appear from the deeds and plan. It did not appear that the defendant had occupied the one half of said partition wall next to the plaintiff's house before the acts complained of, or that his house or the timbers of the same entered it or rested upon it at all.

The defendant contended, among other things, that, even if the plaintiff owned one half of the partition wall and the land on which it stood, he had a right to raise the partition wall in order to put another story upon his own part; that the plaintiff had only an easement in the partition wall at most, if any title whatever.

The plaintiff contended that there was evidence for the jury, under proper instructions from the court, tending to show that he was the owner of one half of the partition wall and the land covered by it; that, if not the owner in fee, he was in actual possession of the same, claiming title, when the defendant entered upon it and did the acts complained of; and that the defendant, by his deeds, had no title whatever to the land in dispute, and that he was a stranger; that, if he had any right to raise the partition wall for the purpose claimed, he had not done it either on his half exclusively, nor on the whole, so as to be of any use to the plaintiff.

At the request of the defendant the judge ruled, as matter of law, that the plaintiff could not recover, and directed a verdict for the defendant. If the ruling was correct, judgment was to be entered on the verdict; otherwise, the verdict to be set aside, and a new trial granted.

A. A. Ranney, for the plaintiff.

R. Stone, Jr., for the defendant, contended that the plaintiff had not shown any title by deed to the land in question; that, if the title was not in the defendant, it was in Blanchard; and that the mere occupation by the plaintiff would not entitle him to maintain the action.

LORD, J. The plaintiff's right to recover in this action depends upon his ownership in severalty of half the division wall between his house and that of the defendant; but the precise question arising upon this report is whether there was evidence to submit to the jury tending to prove such ownership, and we have no doubt that there was such evidence.

There is, perhaps, no rule of construction more familiar than the rule that, in an instrument of conveyance of land, if there be any discrepancy between distances and monuments mentioned in the deed, the monument must be regarded as controlling, and the distance must yield. This rule is so well settled, and is founded upon such sufficient reason, that no discussion of it is necessary. We apprehend that the error at the trial arose by reason of a supposed application of this rule. It would seem to have been assumed at the trial that the only monument referred to in the deed was the "brick fence of the primary school-house;" and that in order to ascertain the plaintiff's land it was necessary to begin at a point at a certain number of feet from the corner of the brick fence referred to. The other monuments, such as Rutland Street and the ways referred to, are in any view of the case entirely immaterial, except as they indicate the general locality of the lot.

Upon looking into the deeds, however, we are entirely clear that there are other and important monuments which must be conclusive evidence of the rights of the respective parties. The city of Boston was the owner of these two lots and sixteen others bordering upon Rutland Street. It was a single tract of land, but divided by the city into lots numbering 1 to 18 inclusive, which lots covered the entire territory. The two lots now in the occupation of these parties respectively were bought of the city by William E. Blanchard. Blanchard entered upon the lots under an agreement of the city to convey them to him before he received a deed. The deed under which the plaintiff claims bears date January 1, 1858, and recites that it is given and accepted in full performance of a certain agreement dated May 1, 1857; and is expressed to be made subject to certain conditions. One of those conditions is, "The building which may be erected on the said lot shall be of a width equal to the width of the front of the said lot." Another of the conditions is, "No building which may be erected on the said lot shall be less than three stories in height exclusive of the basement and attic, nor have exterior walls of any other material than brick, stone or iron, nor be used or occupied for any other purpose or in any other way than as a dwelling-house during the term of twenty years from October 1, 1857."

Such a building, when erected, would seem to be a substantial monument; and the deed goes on to recite that "the building at present erected upon the said lot is in conformity with the above conditions, and is satisfactory to the said city of Boston." This was the first conveyance by the city of Boston of either of the two lots; and the question is, What lot of land did that deed convey? For if that can be made certain, the deed being first in time will be first in right.

There can be no valid construction of that deed except such as gives to Blanchard a lot of land twenty-one feet in width, the front line of which upon Rutland Street is covered through its entire length with such a building as is described. We say, the front line of which upon Rutland Street; the building, by another condition in the deed, was to be set back fifteen feet from Rutland Street and on a line parallel with it; but inasmuch as the lots are all rectangular, the open space of fifteen feet in front of the building cannot in any manner be of value in determining the construction of the deed, and the lot which is to be sought for in locating that deed is a lot upon which a building is erected, the front line of which is coincident with the width of the lot. Without regard to subsequent conveyances, the lot and building, as the building stood when this conveyance was made, passed to Blanchard from the city of Boston. This lot, through divers mesne conveyances, has come to the plaintiff, and was numbered 12 upon the original plan of the city of Boston. The defendant's lot was an adjoining lot, and numbered 13 upon the same plan. The title to that lot comes also through Blanchard from the city of Boston, and it was conveyed to Blanchard on May 14, 1858, and at the time when Blanchard received the title he was the owner of the plaintiff's lot, or lot 12. The deed which he received from the city contained the same recitals and the same conditions with the previous deed, and it contained also the statement that the building then erected upon it was in conformity with the conditions. We have, then, Blanchard the common owner of two adjoining estates, each with a dwelling-house upon it covering the entire front land of its respective lot. Under such circumstances the conveyance of the house and lot, or the lot and house thereon, without any more particular description, would

convey these lots respectively as they were received from the city of Boston; and when the general purpose of a deed was to convey either of the houses specifically, it would require very cogent language to induce us to hold the dividing line between the two estates to be different from or other than that which was established by the building of the houses, the giving and accepting of the deeds, the practical establishment of the line by all parties in interest. Upon looking at the deeds, however, we find nothing to indicate any purpose of Blanchard, or of any grantee in either line of title, to change the original limits of the respective lots; but, on the other hand, all the conveyances have carefully preserved the original descriptions of the estates; and the respective occupations must be deemed to have been in accordance with the respective titles. Although, when Blanchard made his first conveyance of lot 12, he did not speak specifically of any monument except the brick fence and lot 12, yet lot 12 had then become as permanently fixed as a monument as the house itself; and if the distance between the brick fence and lot 12 is erroneously stated in the deed, such distance must be rejected. But when Blanchard conveys subsequently the lot now occupied by the defendant to Barse, he carefully describes the line between these two respective estates as running "to and through the centre of the brick partition wall;" and such description has been followed in every conveyance, to and including that to the defendant. It is therefore clear that the defendant has no title to that part of the wall which the plaintiff claims that he has interfered with.

It is said, however, that it is immaterial whether the defendant has title or not, because the plaintiff must prevail upon the strength of his own title, and not by reason of the weakness of the defendant's. If this doctrine were applicable to actions of trespass in which the boundary lines of adjoining estates are involved, the answer is obvious. The plaintiff shows a deed of a dwelling-house which, if not conclusively establishing his right to the centre of the division wall, *prima facie* establishes his entire right to the whole building to the centre of the partition wall, and the occupancy of the building is presumed in law to be co-extensive with the title; and if the defendant shows that he has exercised any acts of ownership over that portion of the estate,

prima facie those acts are trespasses, which he cannot justify without showing title, and when he produces his title it excludes the locus from his estate. Although this answer is conclusive, we do not mean that it shall be inferred that the rules of evidence are the same in an action of trespass which depends upon the boundary line between two contiguous estates, and in a writ of entry brought to recover a tract of land averred to be in the possession and occupation of the tenant, of which possession the demandant seeks to deprive him. That question, however, we need not discuss. It is sufficient for us to say that there was evidence which, if not conclusive, was certainly competent for the jury to consider in determining whether the plaintiff had established his right in severalty to that half of the division wall which adjoined his house.

Verdict set aside, and new trial granted.

THE SECOND CASE was a bill in equity to enforce the following restrictions contained in a deed from the city of Boston to William E. Blanchard, the defendant's grantor: "2. The front line of the building which may be erected on the said lot shall be placed on a line parallel with and fifteen feet back from the said Rutland Street." "4. No dwelling-house or other building, except the necessary outbuildings, shall be erected or placed on the rear of said lot." At the hearing before Soule, J., the following facts appeared:

In 1857, the city of Boston, then the owner of vacant land on Rutland Street, made an agreement with William E. Blanchard to sell to him thirteen lots of land on that street, numbered from 5 to 18 on a plan. The agreement contained the conditions above set forth. Blanchard built a block of houses, and the city conveyed the lots to him by separate deeds, each setting forth the above conditions, and reciting that the building erected on the land conveyed "is in conformity to the foregoing conditions."

The plaintiff subsequently became the owner of lot 12, and the defendant the owner of lot 18. The plaintiff's house as originally built, and at the time of the filing of the bill, was four stories high, and of the same depth as the defendant's house was before the alterations hereinafter mentioned, but had an

extension in the rear one story high above the basement, and ten feet deep, and covering the entire width of the lot.

In March 1878, the defendant altered and enlarged the dwelling-house on his lot by erecting an L in the rear about seventeen feet wide, of a height equal to the height of the house, and extending from the rear wall thereof to within one and one half inches of the rear boundary line of the lot, and leaving a space next to the plaintiff's line about four feet wide, and also by building a rectangular addition to or projection from the front, eight or nine feet wide, projecting three feet and three inches toward the street, and extending from the level of the main floor, about four feet from the ground, to the cornice at the top of the building. This addition was of iron frame, and in it were set windows for the several stories of the house. The timbers supporting this addition were locked into the timbers of the several floors, and the addition had no other support. The front line of the building, at the date of the deed from the city of Boston to Blanchard, and until the alteration was made, was straight, and parallel with the line of Rutland Street, and distant fifteen feet therefrom. The window caps and sills and the eaves projected slightly beyond the brickwork. The steps led up from the open space in the front of the house. Over the front door there was a window in each story, and there were windows in the basement. At the time the defendant was making these alterations, the plaintiff objected thereto, and requested him to conform to the conditions in the deed from the city to Blanchard.

Upon these facts, the judge was of opinion that the plaintiff was entitled to relief in respect to the additions on the front of the defendant's house, but not as to the additions in the rear; and reported the case for the determination of the full court.

Ranney, for the plaintiff.

Stone, for the defendant.

Soule, J. It often happens that owners of land, which they design to put into market in lots for dwelling-houses, insert in the deeds of the several lots a uniform set of restrictions as to the purposes for which the land may be used, and as to the portions of it which may be covered by buildings. So far as these restrictions are reasonable in their character, they are upheld and enforced by courts of equity in favor of the original

owner, so long as he continues to own any part of the tract for the benefit of which the restrictions were created, as well as in favor of the owner of any one of the lots into which the tract was divided, and against the owner of any of the lots who attempts to set the restrictions at naught. *Whitney v. Union Railway*, 11 Gray, 359. *Parker v. Nightingale*, 6 Allen, 341. *Linzee v. Mixer*, 101 Mass. 512. *Western v. Macdermott*, L. R. 2 Ch. 72.

The defendant admits that this is the law, but contends that what he has done is not in violation of the restrictions in his deed. We are of opinion, however, that his position cannot be maintained. The deed provides that the front line of the building which may be erected on the lot shall be placed on a line parallel with, and fifteen feet back from, Rutland Street. The front wall of the defendant's house leaves the ground on a line precisely fifteen feet from the street, but from a point about four feet above the ground he has constructed an addition to his house, about eight or nine feet wide, in a line parallel with the street, and projecting three feet and three inches toward the street, and extending to the cornice at the top of the house. This addition starts from a level with the top of the steps which lead to the front door, and from that point extends to the top of the building. It is rectangular, and extends over nearly one half of the width of the lot on which the house stands. We cannot regard this addition as an ordinary projection, or variation of detail in the arrangement and ornamentation of the front of the house, which the parties to the deed from the city may have contemplated as being proper under the provisions of the deed. The addition is in substance and effect a removal of the front line of the house three feet and three inches nearer to the street than the deed permits. The effect on the adjoining estates is substantially the same as if the addition were supported by a wall rising from the ground perpendicularly to its front line, instead of being supported as it now is. The plaintiff is therefore entitled to relief on account of this violation of his rights.

The erection and maintenance of the addition to the back part of the house are equally without right. Whatever uncertainty might exist as to the meaning of the restriction in the deed which provides that "no dwelling-house or other building, except

the necessary outbuildings, shall be erected or placed on the rear of said lot," if there had been no house on the land when the deed was delivered, and if the words stood alone and unexplained, we are of opinion that, inasmuch as the grantee accepted his deed of the defendant's lot from the city while a house was standing on the land, the front of which was fifteen feet back from the street, and which covered the whole width of the lot, and which was stated in the deed to be "in conformity to the foregoing conditions," all that part of the lot described in the deed which lay behind the house is to be regarded as "the rear of said lot," within the meaning of the condition under consideration. *Keening v. Ayling*, 126 Mass. 404.

The result is that the plaintiff is entitled to a decree for the removal of the structures which have been erected in violation of his rights. *Decree accordingly.*

RUFUS A. JOHNSON *vs.* WILLIAM C. THOMPSON & others.

Suffolk. March 17. — Sept. 11, 1880. AMES & LORD, JJ., absent.

A grantee of land is estopped to deny the validity of a mortgage to which his deed recites that the conveyance to him is subject.

A plaintiff in a bill in equity to redeem land from a mortgage, who conveys his interest in the land *pendente lite*, is not entitled to a decree.

BILL IN EQUITY, filed January 6, 1876, against William C. Thompson, William A. Bacheller and Samuel Atherton, alleging that the plaintiff was the owner of certain parcels of land in Revere; that, in 1872, the former owner of the land mortgaged it for \$5000 to Lyman B. Frazier, who subsequently assigned one undivided half of his interest in the mortgage and note secured thereby to the defendant Bacheller, who subsequently got possession of the mortgage and note, and discharged the mortgage and cancelled the signature on the note, without the knowledge of Frazier; that, after this, the defendant Thompson took a new mortgage upon the land for \$5000, and, for default of payment in the interest, had advertised the land for sale, under a power contained in his mortgage; that the defendant Atherton, the

assignee in bankruptcy of Frazier, contends that Bacheller had no right to discharge the whole of the mortgage to Frazier, and that he has a lien on the land for one half the mortgage debt; that the plaintiff contends that the whole incumbrance upon the estate is but \$5000, and he is willing to pay that sum to the person entitled to it.

The prayer of the bill was that Thompson be restrained by injunction from proceeding with the sale; and that the court should determine the conflicting claims of the parties, and to whom the plaintiff should pay the amount found to be due.

Thompson alone appeared, and filed an answer, averring that Bacheller had authority to cancel and discharge the mortgage to Frazier; and that the defendant's mortgage was a valid lien on the land.

The case was referred to a master, who reported the following facts: On January 1, 1875, the plaintiff purchased the land in question subject to four mortgages: one to Elijah A. Shaw, for \$8000, then held by Augustus N. Loring; one to Charles A. Whiting, for \$1500; one to William Sanborn, for \$800; and one to the defendant Thompson, for \$5000, dated November 20, 1874. On August 6, 1872, the then owner of the land mortgaged it to Lyman B. Frazier, for \$5000; and on December 28, 1872, Frazier assigned one undivided half of the mortgage and note secured thereby to the defendant Bacheller. In 1874, Frazier became a bankrupt, and the defendant Atherton was appointed his assignee. After this, Bacheller, who knew of the bankruptcy, took from Frazier's safe, without his knowledge, the mortgage and note, and on November 19, 1874, having received payment in full of the note, executed a discharge of the mortgage, and cancelled the signature on the note, and still retains the money. On January 5, 1875, the plaintiff conveyed one undivided half of the land to Charles L. Heywood. On March 6, 1876, Atherton, as assignee in bankruptcy of Frazier, assigned to the plaintiff all his right, title and interest as assignee in the mortgage to Frazier. On March 17, 1876, the plaintiff, having purchased the mortgages to Whiting and Sanborn, conveyed his remaining interest in the land to Heywood, who also was the purchaser under a sale made in pursuance of a power of sale contained in the mortgage to Loring.

† The case was then heard by *Ames, J.*, who ordered a decree to be entered dismissing the bill as to Thompson ; and the plaintiff appealed to the full court.

E. Avery & G. M. Hobbs, for the plaintiff.

J. Fox, (*C. Allen* with him,) for Thompson.

Soule, J. It is a settled principle of law that a grantee is estopped to deny the validity of any mortgage to which his deed recites that the conveyance to him is subject. *Tuite v. Stevens*, 98 Mass. 305. *Howard v. Chase*, 104 Mass. 249. We find nothing in the facts of the case at bar which takes it out of the operation of this rule. The plaintiff took his title to the land described in his bill subject to the mortgage to the defendant Thompson. For this mortgage Thompson paid the amount which it purports to secure. It does not appear that he had any knowledge of the transactions by means of which the Frazier mortgage was discharged of record. And there is nothing in the case to indicate that his rights under his mortgage would be in any way affected if he had been informed of those transactions. On the facts existing when the bill was filed, the plaintiff was not entitled to any relief against Thompson, whose right it was to proceed to execute the power of sale in his mortgage, by reason of default in the payment of the interest due, except that he was entitled to redeem the premises from the mortgage by paying the amount of principal and interest due under it. This right to redeem the plaintiff parted with when he conveyed his remaining interest in the land to Heywood. After that conveyance was made, he had no further interest in the mortgage held by Thompson, as it did not secure his obligation, nor in any of the questions which the bill was intended to settle. The decree dismissing the bill was therefore the proper one, and must be *Affirmed, with costs.*

WILLIAM C. THOMPSON vs. CHARLES L. HEYWOOD & another.

Suffolk. March 17. — Sept. 11, 1880. AMES & LORD, JJ., absent.

One who undertakes to execute a power of sale in a mortgage is bound to the observance of good faith, and to a careful regard for the interests of the mortgagor; and a mere literal compliance with the terms of the power is not enough.

If the owner of the equity of redemption of land purchases at a sale made in pursuance of a power contained in a mortgage, and the sale is invalid on account of the fraud of the mortgagee participated in by the purchaser, he cannot, as against a subsequent mortgagee, set up title through the prior mortgage, but this will be deemed to have merged.

Land was sold under a power contained in a mortgage to the owner of the equity of redemption. At the hearing, on a bill in equity brought by a subsequent mortgagee praying that the sale should be set aside on account of fraud, and for further relief, there was evidence of fraud participated in by the purchaser, and that he was removing gravel from the land. *Held*, that the plaintiff was entitled, under the prayer for further relief, to a decree to restrain the owner of the equity from removing the gravel.

BILL IN EQUITY, filed April 22, 1879, against Charles L. Heywood and Augustus N. Loring, alleging that, on November 20, 1874, Sarah W. Worster mortgaged to the plaintiff certain parcels of land in Revere, to secure the payment of \$5000 and interest in three years from that date, which mortgage was still unsatisfied; that, when the plaintiff took his mortgage, the land was subject to three prior mortgages, the first of which was for \$3000 to Elijah A. Shaw, which was assigned to the defendant Loring on October 10, 1874; that the defendant Heywood was the owner of the equity of redemption in said land, having acquired title thereto by two conveyances, one in January 1875, and the other in March 1876, both of which conveyances referred to the mortgages, including the plaintiff's, as still outstanding, and recited that Heywood agreed to pay the same.

The bill further alleged that, on May 25, 1878, Loring executed a deed of the premises to Heywood, purporting to convey the land absolutely to Heywood, as the purchaser of the same by public auction, in execution of the power of sale contained in the first mortgage, of which Loring was the assignee; that the only public notice of the sale was by an advertisement in a paper called the Boston Home Journal, published in that part

of Boston formerly Roxbury, having a very limited circulation, and no circulation in Revere, or in Lynn, where the plaintiff lived; that the sale took place at eight o'clock in the morning, and no one was present except Heywood, the auctioneer and one Rufus A. Johnson, the person who conveyed the equity of redemption in the land to Heywood; that the land was struck off to Heywood for \$3023, when in fact its value was from \$10,000 to \$15,000; that Loring had nothing to do with conducting the sale or with giving the notices of it, which matters were attended to by Heywood; that the plaintiff had no knowledge of the sale until April 8, 1879; and that Heywood was not a purchaser in good faith.

The prayer of the bill was that the sale and conveyance to Heywood might be set aside; that the defendants be ordered to assign the first mortgage to the plaintiff upon his paying what, if anything, might be due thereon; and for further relief.

Heywood filed an answer denying that he had anything to do with conducting the sale, and averring that he was a purchaser at the sale in good faith. Loring also filed an answer averring that he sold his mortgage to Heywood for the amount of the principal and interest due thereon; that he knew nothing about any sale under the power contained in his mortgage; and that he acted in good faith.

At the hearing, before *Ames, J.*, it appeared that the record title of the parties to the land in question was as set forth in the bill; that Johnson, while he held the equity of redemption under a deed in which he assumed to pay the mortgages then outstanding, purchased the second and third mortgages; that the sale was in literal compliance with the terms of the power contained in the mortgage held by Loring, and was made soon after eight o'clock in the morning of May 25, 1878; and that the circulation of the paper in which the advertisements of the sale were made was as stated in the bill. There was also evidence that the hour fixed for the sale was an unseasonable one; and that there was but one person present at the sale besides those named in the bill; that Johnson caused the notices of the sale to be advertised with Heywood's knowledge; that Heywood paid for the advertisements; and that the plaintiff's knowledge of the sale was as stated in the bill. Loring testified that he

knew nothing about the sale, did not authorize Johnson to advertise the land for sale, and supposed, when he signed the deed purporting to convey the land in execution of the power contained in his mortgage, that he was merely assigning his mortgage. Johnson testified that he acted with Loring's knowledge, and as his agent, and that there was no collusion between Heywood and himself. Heywood testified that Johnson did not act as his agent, and that he bought the land in good faith. It also appeared in evidence that Heywood was removing gravel from the land.

The judge ordered a decree to be entered that the power of sale under the mortgage held by Loring was not duly executed, and was of no validity as against the plaintiff; that the payment by Heywood to Loring of the amount secured by the mortgage extinguished the same; and that the defendants discharge the mortgage upon the record, or by deed or release; that Heywood was not entitled to set up the second and third mortgages by reason of the conveyances to him from Johnson; and that Heywood be enjoined from removing gravel from the land. Heywood appealed to the full court, where the case was heard on the bill, answer, and a full report of the evidence.

J. Fox, (C. Allen with him,) for the plaintiff.

E. Avery & G. M. Hobbs, for Heywood.

SOULE, J. One who undertakes to execute a power of sale is bound to the observance of good faith, and to a careful regard for the interest of his principal. A mere literal compliance with the terms of the power is not enough. And though a stranger to his proceedings, finding them regular in form, and purchasing in good faith, and who has paid value for the premises, might not be affected by his unfaithfulness, no one who participated with him in attempting to execute the power, without regard to the interest of the principal, is entitled to reap any benefit from such fraudulent conduct. *Montague v. Dawes*, 14 Allen, 369. *Roche v. Farnsworth*, 106 Mass. 509. *Drinan v. Nichols*, 115 Mass. 358.

Upon the evidence in the case, the power of sale in the mortgage held by Loring was not executed in good faith, and Heywood, the purchaser at the sale, participated in the attempt to make the sale as private as possible, by publishing the notice

in a paper which did not circulate in the region about the mortgaged premises, by fixing the sale at an unreasonably early hour in the morning, and by going through the form of an auction sale, when the absence of bidders made it manifest that a due regard for the interest of the principal required a postponement, and further and more public notice. The decree, so far as it declared the attempted foreclosure of the Loring mortgage to be void, cannot, therefore, be disturbed.

The decree was right, further, in ordering that the payment by Heywood of the amount of the Loring mortgage should be taken and regarded as an extinguishment of that mortgage. He was the owner of the equity of redemption of the plaintiff's mortgage, under a conveyance in which he had undertaken to pay all the mortgages on the land. Any payment of either of the mortgages by him must be regarded as extinguishing such mortgage, without regard to the form of the instrument by which the mortgagee may have attempted to transfer his interest to the owner of the equity. *McCabe v. Swap*, 14 Allen, 188. *Putnam v. Collamore*, 120 Mass. 454.

On the same principle, the mortgages which were paid by Johnson, while he held the equity of redemption under a deed in which he undertook to pay the mortgages, were extinguished, and cannot be set up against the plaintiff, by Heywood.

The defendant Heywood was properly enjoined against removing gravel from the land. The fact that he was doing so was brought out in the evidence, and the prayer of the bill, which is not only that the sale be set aside, and that the defendant be restrained from making any conveyance of the premises or any assignment of the Loring mortgage, but for such other and further relief as may seem meet, is broad enough to be a foundation for this part of the decree. *Decree affirmed, with costs.*

C. H. WONSON *vs.* NORMAN F. FENNO & others.

Suffolk. March 18. — Sept. 11, 1880. AMES & LORD, JJ., absent.

The plaintiff bought of a member of a firm shares of stock in a corporation, and took from the firm a power of attorney authorizing him to procure a transfer of the shares on the books of the corporation. The firm had at the time a large number of shares standing to its credit on the books of the corporation. The plaintiff delayed for some months to present his power of attorney to the corporation, and in the mean time the firm sold all of its shares to other persons, who obtained certificates from the corporation. *Held*, that the plaintiff was not entitled in equity, as against a partner who had no knowledge of the transactions, to a decree for the delivery to him of a certificate of the shares of stock, which had risen in value; but was entitled to a decree for the money which he had paid, with interest.

ENDICOTT, J. This is a bill in equity; and it appears by the report of the single justice of this court, before whom the case was heard, that the plaintiff bought of Fenno & Homer, on July 10, 1878, one hundred shares of the Cincinnati, Sandusky and Cleveland Railroad Company, and paid to them \$487.50 for the same, and a power of attorney for the transfer of these shares was duly executed to the plaintiff. It also appears that on July 6, 8 and 9, Fenno & Homer sold in like manner to other parties fourteen hundred shares of this stock, and that certificates for those shares were issued to the purchasers by the company between July 12 and August 13 following. On July 11, there were nine hundred shares standing in the name of Fenno & Homer on the books of the company, and other shares were afterwards transferred to them or to Fenno as trustee; and it was expressly found that the plaintiff could have obtained a certificate from the company for his one hundred shares at any time between July 11 and August 13; but he made no application for a certificate until February 1879, at which time no shares were standing in the name of Fenno & Homer.

Soon after July 10, Fenno & Homer dissolved partnership, a settlement was had, and Fenno subsequently left the Commonwealth, being a defaulter; but Homer had no knowledge of the sale of shares to the plaintiff until after the bill was filed, though the money was paid to Fenno by the plaintiff before the dissolution of the firm. Nor did Homer know that the stock account

had been overdrawn, but he settled with Fenno upon such information as he had. Nor does it appear that any of this stock came into his hands upon the settlement, or that the firm or either of its members had any interest in the stock after August 13.

The bill was originally brought against Fenno & Homer and the railroad company, and prayed for specific performance of the contract, on the ground that they fraudulently caused the stock which the plaintiff had purchased to be transferred, in order to prevent its coming into the hands of the plaintiff. The bill also prayed for general relief. No service was had upon Fenno, who, it was alleged, had fled from the Commonwealth. An amendment was afterwards filed, by which the persons to whom Fenno & Homer had sold stock on July 6, 8 and 9, and the assignee in bankruptcy of Fenno, were made parties. All the parties defendant filed answers, and the case was heard upon evidence. Fraud was not found by the presiding judge, and, as there is no report of the evidence, we cannot assume that the transfers after July 11 were made to prevent the plaintiff from obtaining the stock purchased by him. A decree was entered dismissing the bill against all the defendants except Homer, and ordering him to pay the plaintiff the amount of \$487.50, with interest and costs. From this decree both parties appeal.

No objection is made before us, by the plaintiff, as to the dismissal of the bill against the other parties; and it only remains to be decided what are the equitable rights of the plaintiff, as between himself and Homer. Nor does he contend that there was fraud in the transaction; but he contends, upon the facts found, that Homer should be compelled to perform the contract, and give him a certificate for one hundred shares. But a court of equity will not decree specific performance, unless, upon all the facts disclosed, it is manifestly just and equitable to do so as between the parties before the court. The plaintiff could have obtained his stock by applying to the company for a certificate at any time within a month of the purchase, but he made no such application until more than six months afterwards. Having thus voluntarily neglected to demand his stock, it would not be equitable to give him the benefit that would accrue from its rise in value. He obtains all he is entitled to by the decree,

which imposes upon Homer the duty of paying what his firm received from the plaintiff in payment for stock never transferred to him on the books of the company.

Nor can the grounds taken by the defendant Homer before us be sustained. Although the firm, by giving a power of attorney to transfer the stock, did all that was necessary to enable the plaintiff to obtain it, if he had used due diligence, yet, by reason of their subsequent acts, the plaintiff failed to get it, and equity requires that Homer should pay back the money received by the firm before its dissolution. The bill should not be dismissed because the plaintiff might recover this sum in an action at law; for a court of equity, while denying the specific relief prayed, may give to a plaintiff the compensation to which he appears to be entitled. See *Milkman v. Ordway*, 106 Mass. 232.

The evidence of sales and transfers of this stock to other parties, who were parties to the bill, was competent as showing why the plaintiff did not obtain his stock, and as bearing on the question whether the transactions were fraudulent as against the plaintiff.

Decree affirmed.

J. C. Lane, for the plaintiff.

W. W. Carruth & F. A. Dearborn, for the defendant Homer

ELIZABETH E. READ vs. JOHN E. STEWART.

Suffolk. March 8. — Sept. 18, 1880. ENDICOTT & SOULE, JJ., absent.

Since the St. of 1871, c. 812, a married woman may maintain an action of tort on the Gen. Sts. c. 85, §§ 1, 2, to recover treble the amount of money lost by her husband at gaming, he not having sued for the same within three months of the loss.

TORT on the Gen. Sts. c. 85, §§ 1, 2, to recover treble the amount of money alleged in the first count of the declaration to have been lost by George W. Read, within one year, by gaming with the defendant, and in the second count to have been lost by the said Read, by gaming in a house occupied by the defendant, in which money was lost at gaming with his knowledge.

Both counts alleged that said Read had not prosecuted an action therefor within three months of the loss. Writ dated October 5, 1878. The answer contained a general denial, and alleged that the action was not brought by the plaintiff, in good faith, for her own use, but for the benefit of her husband, the said George W. Read, or by the said George W. in the name of his wife; and that the plaintiff was a married woman, and the action was not concerning her separate property.

At the trial in the Superior Court, before *Wilkinson*, J., it was admitted that the plaintiff was the wife of George W. Read; and there was evidence tending to show that he lost the money by gaming, as alleged; that he did not prosecute therefor within three months of the loss, and that the plaintiff brought and prosecuted this action herself.

The defendant asked the judge to rule as follows: "1. The wife of the loser of money or goods by unlawful gaming, which he has not himself prosecuted for within three months of the loss, cannot maintain an action of tort upon the Gen. Sts. c. 85, §§ 1, 2, for treble the value of the money or goods so lost. 2. The plaintiff, being the wife of George W. Read, who lost by gaming the money mentioned in the declaration, cannot maintain this action for treble the amount so lost."

The judge declined so to rule; and instructed the jury as follows: "The first inquiry is whether the plaintiff can maintain this action. It is contended that she is the wife of the losing party, and that the action in reality is brought by him. The statute provides that treble the value of the money lost may be recovered (provided the party who lost it does not bring an action within three months) by any person who shall afterwards bring the action; so that if this action was brought by George W. Read, the loser, it was not brought within the period of limitation. The action is in the name of the wife, who, it is contended, is the plaintiff in this case. On the part of the defendant it is contended that she is merely the nominal plaintiff; that the action is in fact her husband's, and is brought by him, though her name is used, and that is the first inquiry which you are to make. His wife may bring the action as well as anybody else. If she brings the action herself, the mere fact that she is the wife of the party who lost does not preclude her from bringing

this action, if it is brought by her in good faith. The simple fact that he has somewhat assisted her or advised her in reference to this action, merely aiding her in the prosecution of the action, would not prevent her right to recover. But if he instituted the action and carries it on, using her name, then it is substantially his action, and would be the same as though it was brought in his name. It will be for you to say, upon all the facts, whether it is her action or his action."

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

J. S. English, for the defendant. The Gen. Sts. c. 85, §§ 1, 2, so far as they authorize any person other than the loser to recover, are penal and not remedial, and are to be construed strictly. *Bones v. Booth*, 2 W. Bl. 1226. *Beals v. Thurlow*, 68 Maine, 9. *Commonwealth v. Snelling*, 15 Pick. 321. *Le Forest v. Tolman*, 117 Mass. 109.

The wife of the loser of money at gaming is not an "other person" than her husband, within the Gen. Sts. c. 85, § 1. The statutes giving certain rights to married women are in derogation of the common law, and are to be construed strictly. *Edwards v. Stevens*, 3 Allen, 315. See also *Towle v. Towle*, 114 Mass. 167; *Holmes v. Holmes*, 40 Conn. 117.

Before the St. of 1871, c. 312, a married woman could not sue alone for any personal injury, and this statute was intended to meet this difficulty, and not to create a new cause of action. In all cases where the Legislature has intended that a married woman should have a right to sue, in a case similar to the one at bar, the right has been expressly given. See Gen. Sts. c. 86, § 38; Sts. 1869, c. 415, § 40; 1875, c. 99, § 16; 1879, c. 297.

R. Lund, (*D. F. Crane* with him,) for the plaintiff.

LORD, J. Under the instructions given by the presiding judge at the trial, it must be assumed that this action is the action of the plaintiff, and not that of her husband; that it was commenced by her in good faith, and upon her own account, and upon her own responsibility, and is in no sense to be regarded as the suit of her husband. This presents the question distinctly and precisely, whether, under the St. of 1871, c. 312, a married woman may bring an action under a penal statute to recover a penalty.

It is true, as contended by the defendant, that the statute which gives this remedy to a third person is highly penal; and the general proposition of the defendant, that while, so far as the loser of money at gaming is concerned, the statute may be considered remedial, yet as to the common informer or third person, or party seeking to enforce the forfeiture of three times the amount lost, it is to be regarded as a penal statute, is undoubtedly supported by the authorities in this and other jurisdictions; so that the question presented is whether a married woman may bring an action for a penalty recoverable by any person who shall sue therefor.

The action must by statute be an action of tort. Gen. Sts. c. 85, § 1. The St. of 1871, c. 312, is in these words: "Any married woman may sue and be sued in actions of tort in the same manner as if she were sole, and her husband shall not be liable to pay the judgment against her for damages or costs in any such suit, but the same may be collected out of her property, real or personal; and all sums recovered by her in any such suit shall be her sole and separate property." The contention of the defendant is that the language of the statute, construed with reference to the persons and the subject-matter to which it is applicable, should be construed as if it was "actions for tort;" thus intending to limit the action to injuries personally suffered by the woman bringing the action, or to injuries personally inflicted by the woman against whom the action is brought.

We do not determine whether, if the phraseology of the statute had been "actions for tort," instead of "actions of tort," any different meaning would have been conveyed; for if not, it is certainly unnecessary to discuss it. If, however, the meaning would have been different, such a construction of it would be a legislative, and not a judicial interpretation, which alone we are authorized to make. It is undoubtedly true that, if language is used in a statute susceptible of different constructions, that construction would be adopted which is in harmony with the general policy of the Commonwealth, and decisive language would be necessary to show a purpose in the Legislature to change such policy; and ordinarily, if the language of the statute was susceptible of a construction consistent with the rules of the common law, and of another construction in derogation of the principles

of the common law, in the absence of any controlling facts, that would be deemed to be the true construction which was in harmony with the common law.

It is scarcely necessary to say that within the last fifty years very great changes have been made respecting the rights and the disabilities of married women. If, in the early stages of such legislation, it could be said that the enlargement of a right or the removal of a disability was to be construed strictly, because in derogation of the common law, such a proposition could scarcely be maintained at the present time. Even if it cannot now be said that the policy of the Commonwealth is in this respect entirely changed, so that the rights which a married woman shall possess are to be construed liberally, upon the presumption that she has all the rights of a feme sole, except such as are withheld from her by special provision, we certainly are not prepared to say that the same rules of construction should be acted upon now which were properly regarded when the common-law disabilities of married women began to be removed; and we are at least authorized to regard the language used by the Legislature when applied to married women, as we would regard it when applied to other persons.

The Gen. Sts. c. 85, § 1, provide, that, if the loser of money at gaming does not sue for and recover the money or other things lost within three months after the loss, "any other person may sue for and recover treble the value thereof in an action of tort." There is no limit in words in reference to the other person who may sue; and if the language must be construed as meaning any person not under legal disability, such qualification could of course have no application to one after the disability is removed; and the question is not whether there was a disability at the time of the enactment of the General Statutes, but whether there is any disability at the time the suit is brought.

It is said, however, that, in any view of the statute, married women have no rights in contract except in relation to their own separate property, nor in torts except in relation to their personal wrongs. But this is merely *petitio principii*. It does not determine what is a right of property, nor what is a personal wrong.

The initial step by which a married woman seeks to acquire property is a step in relation to her own property, although she

is not possessed of a farthing's value of property. A woman takes a bond for a deed; she may borrow money to advance toward the consideration of the deed, and give her promissory note for that money; or she may give her promissory note in payment for the land; or she may receive a deed and make a mortgage back simultaneously with the deed; and these are all transactions in relation to her separate property. *Ames v. Foster*, 3 Allen, 541. *Chapman v. Foster*, 6 Allen, 136. *Stewart v. Jenkins*, 6 Allen, 300. *Estabrook v. Earle*, 97 Mass. 302. See also *Parker v. Kane*, 4 Allen, 346; *Basford v. Pearson*, 7 Allen, 504.

We cannot doubt, therefore, that the statute, by the phrase "any other person," includes married women. There seems no reason why the initial step by which a married woman is to become possessed of property, of which she is to have the sole benefit and control, should be limited to any particular mode. Whatever property she acquires as the result of an action of tort is as completely and effectually her own sole and separate property as that which is acquired by her in any other mode, whether by bargain and sale or by any other contract.

A very satisfactory, perhaps conclusive, test of the correctness of this construction of the statute may be thus presented: there is no question but that a married woman may keep a boarding-house on her own account, or that she may, in her own right, own a house and occupy the same; thus owning and occupying a house of either description, she may have entire and absolute control of it, and in such house there may be gaming with her knowledge or consent; and there can be no doubt that, under the provisions of the Gen. Sts. c. 85, § 2, she would be liable for money lost at gaming in her house, with her knowledge or consent, in the same manner as the winner; and that such liability would be a sole liability, for which an action could be brought against her under the St. of 1871, c. 312.

Exceptions overruled.

FRANKLIN KING & others, petitioners.

Suffolk. March 12. — Sept. 13, 1880. ENDICOTT & SOULE, JJ., absent.

The costs of the proceedings of commissioners, appointed under the St. of 1871, c. 338, to make division of flats, are to be apportioned among the several owners thereof, according to the market value of their respective shares or interests, and not according to the area of the flats.

If, upon a petition under the St. of 1871, c. 338, for a division of flats, commissioners are appointed, who notify and hear all parties interested, make their surveys and plan, and report to the court, and the report and plan are approved and ordered to be recorded, and no exception is taken to the report, the objection is not open, upon the apportionment of costs of the proceedings, that the commissioners have failed to fix the boundaries of the flats wholly below mean high-water mark and not adjacent to upland held by the same owner.

LORD, J. This is a petition under the St. of 1871, c. 338, for a division of flats. All the parties now before the court originally joined in the petition, and have continued parties thereto throughout all the proceedings.

The statute was designed for the benefit of owners of flats. It was understood by such owners to be for their benefit. The boundary lines of flats, by reason of the peculiar conformation of the upland, are not always easily ascertainable. To avoid dispute, difficulty and litigation, it was deemed expedient to authorize that "persons holding lands or flats adjacent to or covered by high water may have the lines and boundaries of their ownership in such flats settled and determined." To this end any one or more of the persons holding such lands or flats may apply by petition to this court "for the settlement and determination of ownership in such flats." Upon such petition, the court may appoint commissioners, whose duty it is "to make a survey of the flats of the petitioners, and of all other flats adjacent and owned by other parties, whose rights may be affected in determining the lines of such petitioners' flats," and "determine the boundary lines of all such flats, and report to the court the boundaries established for each owner of such flats, with a plan of the several portions of flats, showing the lines established for each owner, which plan, after its approval, shall by order of the court be recorded in the registry of deeds for the county where

said flats lie." It is also provided by the same act that the report of such commissioners, with the plan, when so accepted by the court, and so recorded, "shall forever fix and determine the rights of all persons and parties, except where definite boundary lines have been established by parties legally authorized so to do."

Under this petition, commissioners were appointed, who notified and heard all parties interested, made their surveys and plan, and made their report to the court, which report and plan were approved, and ordered to be recorded in the registry of deeds. No exception has been taken to the report of the commissioners, and all proceedings under the petition are finished, and the only question open now and undecided is the apportionment of the expenses and charges of the commissioners and the other costs of the proceeding among the several petitioners. The statute provides that "the expenses and charges of the commissioners shall be ascertained and allowed by the court; the other costs shall be taxed in the usual manner, and the whole shall be apportioned by the court upon all parties interested in determining their boundary lines over such flats, to be paid in proportion to the share or interest they respectively hold in the flats."

The amount of costs to be apportioned was fixed, and there was no controversy as to its correctness. The only question made was as to the apportionment. This question was referred to an assessor, who made his report to the court. By that report, the assessor has divided the flats into two classes; one class embracing flats adjacent to upland belonging to the same owner; the other, flats which are not adjacent or appurtenant to upland owned by such parties. We do not understand that exception or objection is taken to this classification, or that it would make any difference in the apportionment, except that one or more of the petitioners contends that flats not adjacent to upland belonging to the same owner should not be assessed at all. The assessor has made his report, and has apportioned the cost and expenses among the various owners according to the market value of their respective shares or interests, exclusive of improvements made upon such flats as were adjacent to upland held by the same owner.

The objection to this apportionment is, first, that the basis of apportionment adopted by the assessor is radically wrong, and that, instead of adopting the market value of the several portions of flats as his basis for apportioning the costs, he should have adopted area of flats alone, irrespective of their value. The area of flats is very often in the inverse ratio of their value, and it would require stringent language to induce us to believe that the Legislature intended that the expenses of a proceeding designed for the mutual benefit of all the owners of flats should be borne in what may be the inverse ratio of the benefit conferred. But, upon looking at the statute, we are satisfied that the elaborate and ingenious criticism of words fails wholly to take from the language of the statute its obvious purpose to make the flats contribute to the proceeding in proportion to their value. That language is, "in proportion to the share or interest." These are equivalent terms, and, if any criticism is to be made by reason of the use of both words, this is the obvious criticism: that "interest" is used for the purpose of defining and making certain the meaning of the word "share;" and the meaning of the word "interest," when applied to a kindred subject, has been judicially determined to refer to value, and not to area. *Henry v. Thomas*, 119 Mass. 588. In that case, it was a petition for the appointment of commissioners to prescribe the measures to be adopted for the improvement of certain meadow lands of which the petitioners claimed to be the greater part in interest; and the judge of the Superior Court ruled that "the greater part in interest" meant those having the greater part in extent of territorial area, and not in value, which ruling this court held to be erroneous. We think, therefore, that, upon the words of the statute, the rule adopted by the assessor was the true rule.

Prior to the St. of 1871, a division of flats was authorized under the St. of 1864, c. 306, and the proceedings to that end were under the provisions of the Gen. Sts. c. 186, relating to the partition of lands. That statute uses the same words, "share or interest;" and in the statute for the partition of lands, no other meaning can be attached to the words than that of value.

The remaining question is whether any part of the expense should be apportioned to those flats which are wholly below

mean high-water mark, and not adjacent to upland held by the same owner. The ground upon which it is contended that such flats should not bear any portion of the expense of determining their boundaries is that the commissioners have failed to fix the boundaries. This subject is not open upon the report before us. The petition embraced these flats in terms. The statute does not exclude the jurisdiction of the commissioners over them. They acted under the petition in reference to these flats; they made surveys and plans which included these flats, and marked the boundary lines thereof; and their report in reference to them was accepted by the court. If there had been any failure to perform their duty, or any irregularity in the mode of the performance of it, the proper time to object to their action or mode of action was before the acceptance of their report by the court; and, if the acceptance of their report was in any manner prejudicial to the rights of any party, such party should have taken exception to the ruling of the court accepting the report. The commissioners, having the subject before them properly presented by the petitioners, have made a return in which they profess to have performed the duty assigned to them. Upon the taxation or apportionment of costs, no such question can be open; and, inasmuch as these are the only objections to the report of the assessor, the apportionment of costs must be *In accordance with the assessor's report.*

T. S. Dame & C. T. Gallagher, against the apportionment made by the assessor.

W. A. Munroe, (C. R. Train & A. S. Wheeler with him,) in support of such apportionment.

ELIZABETH H. WHITAKER vs. JOHN GREER.

Suffolk. March 15. — Sept. 18, 1880. ENDICOTT & SOULE, JJ., absent

Under the Gen. Sts. c. 135, damages for the detention of dower cannot be recovered prior to the demand on which the action is founded.

WRIT OF DOWER, dated June 20, 1876. The demandant recovered judgment for her dower, and commissioners assigned her dower out of the rents and profits; and their report was accepted by the Superior Court. The case was then tried, on the question of the assessment of damages for detention of dower, before *Brigham*, C. J., who allowed a bill of exceptions in substance as follows:

The demand on which the action was founded was made May 19, 1876. The demandant offered evidence tending to show that a prior demand of dower was made on the tenant, who was then and has ever since been the owner in fee and in possession of the premises in question, on August 25, 1871; and contended that damages should be allowed from the latter date. The tenant objected to the admission of this evidence; and asked the judge to rule that damages could be recovered in this action only from the date of the demand in 1876. The judge declined so to rule; ruled that the demandant was entitled to recover damages from the date of the first demand of dower upon the respondent; found that such demand was made on August 25, 1871, and that the demandant's damages for detention of dower from that time to May 19, 1876, were \$181.07, and from May 19, 1876, to the time of the finding, February 10, 1880, \$130.24; and found for the demandant for the aggregate of said sums, \$311.31, with leave, under the St. of 1874, c. 248, to have judgment entered for \$130.24 as damages for detention, if, in the opinion of this court, the demandant could not recover damages prior to the demand of May 19, 1876. The tenant alleged exceptions.

T. Dean, for the tenant.

A. E. Pillsbury, for the demandant.

LORD, J. There is no doubt that at common law the claim for dower, and the claim for damages for the detention of dower,

were several and distinct causes of action, and that, when a demand for dower had once been properly made by the widow, her damages for the detention commenced at the time of such demand, whenever made; and these damages she might recover in a separate writ, as a cause of action other than her writ of dower. Such was clearly the law here, at least until the St. of 1783, *c.* 40, if not until the passage of the Revised Statutes in 1836.

Chapter 102 of the Rev. Sts. is apparently intended as a revision of the whole common law upon the writ of dower. Several new provisions are introduced into it, and the natural import of the language would seem materially to change the common-law proceeding, not only in relation to the writ of dower, but to the action for the detention of dower. At common law there was no limitation, except such as the common law itself created, of the time within which the writ of dower should be brought; and it might be brought immediately upon demand. In this Commonwealth, by the St. of 1783, *c.* 40, the heir or other tenant of the freehold was allowed thirty days from the time of the demand in which to set out the dower; and, if he neglected to do so, the widow might, after the expiration of that time, sue for and recover the same. By the Rev. Sts. *c.* 102, § 2, the right of the widow is further limited, by requiring that the action shall be brought within one year from the time of the demand; but "this shall not preclude her from making a new demand and commencing an action thereon," in case an action should not be brought within one year after the first demand. By the third section of that chapter, "if the demandant recovers judgment for her dower, she shall in the same suit recover damages for the detention thereof."

Perhaps the St. of 1783 would have required the same construction; but by the Rev. Sts. *c.* 102, § 3, it is made certain that the damages for the detention are incident to and must be recovered in the writ of dower; and the fourth and fifth sections of the same chapter are new provisions, not theretofore existing, which made very important changes in the rules of the common law. The fourth section is as follows: "The action shall be brought against the person who is tenant of the freehold at the time when it is commenced; but if he is not the same

person of whom the demand was made, he shall be liable for damages only for the time during which he held the premises." And by the fifth section, it is provided that, in the case mentioned in the fourth section, "if the demandant shall recover her dower and damages in the writ of dower, she may afterwards maintain an action on the case against the prior tenant of the freehold, of whom her demand was made, for the rents and profits for the time during which he held the premises after the making of the demand."

We are satisfied that the intention of the Legislature was a revision and abrogation of the common law upon the subject of recovery of dower by suit and damages for detention, and to establish a new and statutory proceeding which must in all cases be followed, and by which the rights of all parties are fixed. Upon this view of the law, it follows that, except in certain cases for which other provision is specially made, damages for the detention of dower are incident to the writ of dower, and cannot be recovered beyond the time when the demand, which is the foundation of the writ, is made.

The interpretation which we have given to the language of the Revised Statutes is its natural meaning; and that it was used in its ordinary import, is clear from the note of the Commissioners who reported them, in which they say: "The widow can suffer no inconvenience from being required to bring her action within the year after making her demand. If she should by any accident be prevented from bringing it within that time, she will only lose her damages during the delay; and upon a new demand, she may recover her dower, and damages from the time of the second demand." These provisions of the Revised Statutes have remained substantially unchanged. Gen. Sts. c. 135. St. 1869, c. 418. *Exceptions sustained.*

JOHN L. RODGERS & another *vs.* FREDERICK JONES & another.

Suffolk. Nov. 18, 1878. — Sept. 14, 1880. COLT & MORTON, JJ., absent.

The defendant made an oral agreement with the plaintiff for the purchase of a specific lot of skins, at an agreed price per pound for merchantable skins and another price for damaged skins, and directed a third person to see them put up, and not to take them away before a certain day, because the defendant wished to ascertain in regard to his insurance. The third person agreed to take them away on the day named, and assorted part of the skins, and then left, saying he would risk the plaintiff doing it all right. The plaintiff then assorted the rest of the skins, ascertained their weights in the usual manner, entered the weights in his books, and put all the skins apart in bundles, marked with the defendant's initials. The third person did not take them away on the day named, and they were destroyed by fire the following night. *Held*, that there was not an acceptance and receipt of the skins, within the statute of frauds.

GRAY, C. J. This is an action of contract to recover the price of a lot of rough calfskins, alleged to have been sold and delivered by the plaintiffs to the defendants.

The testimony introduced by the plaintiffs at the trial was to the following effect: On Wednesday, November 6, 1872, the lot of calfskins in question was piled, apart from other goods, in the plaintiffs' warehouse, when Frederick Jones, one of the defendants, came in with one Kuebler, (a currier, who was to curry the skins when the defendants bought them,) and made an oral agreement with John L. Rodgers, one of the plaintiffs, to purchase the entire lot, at a certain price per pound for the merchantable skins, and two thirds that price for the "culls" or damaged skins; and then said to Kuebler, "I have bought this lot of skins, and I want you to stay and see them put up; but I don't wish you to take them away before Friday or Saturday, because in the mean time I want to ascertain in regard to my insurance." Kuebler answered that he would send his team and take the skins on Saturday. Jones then left the warehouse, and Kuebler remained and assorted about half the skins, throwing them over and separating the merchantable from the damaged skins, and then went away, and the plaintiffs assorted the rest of the lot.

The expression "putting up the skins" means assorting, bundling and weighing. The skins are first assorted by putting

the merchantable skins in one pile, and the damaged ones in another. They are then put in bundles, taking out every twentieth merchantable skin as a test, and weighed. The test skins are then weighed by themselves, spread to dry for at least twenty-four hours, and then reweighed, and the amount of shrinking on the whole lot is ascertained by a calculation based upon the shrinking of the test skins.

The plaintiffs put up this lot of skins in the usual way. The test skins were spread to dry from Thursday night to Saturday morning, and then reweighed, and the weights entered on the plaintiffs' books, and the plaintiffs set the whole lot of skins apart by itself in bundles marked with the defendants' initials. On Saturday, November 9, Kuebler came into the plaintiffs' warehouse, was told that the skins were ready for him to take, and was asked whether his team would be there soon, and he answered that it would not. Nothing further took place, and during the following night the skins were destroyed by fire.

The plaintiffs offered evidence that on Wednesday, after Jones had left their warehouse, and after Kuebler had ceased assorting the skins and before he went away, the following conversation took place between him and Rodgers: Kuebler said, "There is no need of my staying here any longer. This is a good lot of skins. There is no chance for any question as to quality of the skins, and you go ahead and put them up." Rodgers answered, "No, Mr. Jones left you to see them weighed up. It won't take you a great while to go over the rest of them; you do it." But Kuebler said, "No, I can't waste my time. I know you well enough. I'll take the risk of your doing it all right. You go ahead and put up the skins." This evidence was objected to by the defendants, and excluded by the judge, on the ground that there was nothing to show that Kuebler had authority to bind the defendants by anything he did say.

The judge, at the request of the defendants, ruled that there was no such evidence of acceptance and delivery of the skins as would entitle the plaintiffs to recover in this action, and ordered a verdict for the defendants; and the case comes before us on the plaintiffs' exceptions.

It is evident that the learned judge used the word "delivery" to denote what is necessary to pass the title as between seller and buyer; and that the effect of his ruling was that the plaintiffs had failed to prove either of two facts, both of which must be proved in order to maintain the action: 1st. The passing of the title between the parties, at common law. 2d. An acceptance and receipt, within the meaning of the statute of frauds. Gen. Sts. c. 105, § 5.

It is unnecessary to decide whether, under the peculiar circumstances of this case, the jury would have been warranted in finding that the title in the goods passed to the defendants when they had been assorted and set apart by the plaintiffs in the absence of the defendants and their agent. In order to constitute an acceptance and receipt under the statute of frauds, it is not enough that the title in the goods has vested in the buyer; but he must have assumed the legal possession of them, either by taking them into the custody or control of himself or of his authorized agent, or by making the seller or a third person his bailee to hold them for him, so as to terminate the seller's possession of the goods and lien for their price. Allowing the utmost effect to the testimony introduced and offered by the plaintiffs, yet, so long as the goods had not been delivered to the defendants or their agent, but remained in the plaintiffs' warehouse, the plaintiffs, even if they could be held to have parted with the title, had not parted with their possession as sellers, or with the lien incident to such possession; and therefore there has been no such acceptance and receipt as to satisfy the statute of frauds. *Safford v. McDonough*, 120 Mass. 290. *Atherton v. Newhall*, 123 Mass. 141. If Kuebler had authority to receive the goods in behalf of the defendants, there is no evidence that he exercised that authority.

Exceptions overruled.

S. B. Ives, Jr. & G. L. Huntress, for the plaintiffs.

E. D. Sohler, (F. C. Welch with him,) for the defendants.

JOHN C. DODGE & others, executors, vs. NATHAN MORSE
& another.

Suffolk. June 24; September 6. — 14, 1880.

Pending an appeal from a decree of the Probate Court disallowing a will, a compromise, under the Sts. of 1864, c. 173, and 1865, c. 186, was entered into between the executor, those claiming under the will as devisees and legatees, and those claiming the estate as intestate, by which it was agreed that all parties interested should consent to the probate of the will, that a residuary fund provided for in the will should be divided between a minor grandchild of the testator and the residuary legatees, and that the share of the grandchild should be paid to a trustee in trust to apply the income to the support and education of such grandchild until he should become of age, and then to convey the principal to him. The compromise was approved by a decree of a justice of this court sitting in equity, the person named was appointed such trustee, and the will was admitted to probate. The trustee did not give bond, and denied his obligation so to do unless ordered by this court, but claimed to be entitled to receive the share of the grandchild. The executor had in his hands the share of the grandchild ready to be paid to the person entitled to receive it in his behalf; and brought a bill in equity for the direction of the court upon the question whether or not he should pay the grandchild's share to the trustee before he should have given bond. Held, that the executor had a complete and adequate remedy by way of defence to any suit that might be brought against him by the trustee without having given bond; and that the bill could not be maintained.

BILL IN EQUITY by the executors of the will of Samuel Batchelder against Nathan Morse and Maude A. Batchelder, a minor granddaughter of the testator, for whom a guardian *ad litem* was appointed.

The bill alleged that the will was offered for probate, and the probate thereof opposed by said Maude, and the will disallowed in the Probate Court, and an appeal taken by the plaintiffs to this court; that pending that appeal, and under the Sts. of 1864, c. 173, and 1865, c. 186, a compromise was entered into between the plaintiffs and those claiming as devisees and legatees under the will, and those claiming the estate as intestate, by which it was agreed, among other things, that all parties interested should consent to the probate of the will, that a residuary fund provided for in the will should be divided between the said Maude and the residuary legatees named in the will (who were other descendants of the testator), and that the share of Maude should be conveyed, distributed and paid to Morse, in trust to apply the

income to her support and education until she should become of age, and then to convey the principal to her; and by a decree of a justice of this court sitting in equity that compromise was approved, and Morse appointed trustee to receive and hold the property coming to Maude under the compromise and settlement in trust for her; and, upon the appeal from the Probate Court, the will, its execution being proved, was by consent of all parties admitted to probate, and the case remitted to the Probate Court for further proceedings according to law, and for the administration of the estate according to the will, subject to the modification set forth in the decree in equity; that the plaintiffs had in their hands property ready to be distributed and paid to the person entitled to receive it in behalf of Maude; that Morse had not given bond as trustee, and that he denied his obligation so to do unless ordered by this court, but notwithstanding claimed to be entitled to receive in her behalf the share of such property belonging to her, or to him as her trustee. The bill prayed for the direction of the court upon the question whether or not the plaintiffs were to pay or distribute Maude's share to Morse before he should have given bond.

The answers admitted the allegations of the bill; and alleged that Morse consented to accept the trust upon the assurance and understanding that he would not be required to give bond; and that he was appointed trustee upon the petition of the plaintiffs, praying for the confirmation of the compromise, and for his appointment.

The case was set down for hearing upon the bill and answers, and was thereupon reserved by *Endicott, J.* for the consideration of the full court.

J. C. Dodge, for the plaintiffs.

E. R. Hoar & A. A. Ranney, for the defendants.

In support of the jurisdiction of this court over this bill, the following authorities were cited: Gen. Sts. c. 113, § 2. *Dimmock v. Bixby*, 20 Pick. 368. *Hooper v. Hooper*, 9 Cush. 122, 127. *Treadwell v. Cordis*, 5 Gray, 841. *Jackson v. Phillips*, 14 Allen, 539, 593. *Putnam v. Collamore*, 109 Mass. 509. *Lincoln v. Wood*, 128 Mass. 203. *Dearth v. Hide & Leather Bank*, 100 Mass. 540.

GRAY, C. J. The cases cited in argument afford no precedent for this bill. It is not a bill to obtain directions as to the

interpretation of the terms of a will or deed of another person, by or under which the plaintiffs have been appointed trustees; nor are there conflicting claims to the fund in their hands. But the question presented by the bill is whether a trustee, to whom, by a decree made by a justice of this court at the plaintiffs' own request and with the consent of all parties interested, a portion of the fund in the hands of the plaintiffs has been ordered to be paid, is entitled, under all the circumstances of the case, to receive it without first giving bond to the judge of probate. The bill does not impugn the validity of that decree. The doubt suggested is not as to the person entitled to the fund, but as to the steps necessary to be taken by him in order to qualify him to receive it. The plaintiffs have a complete and adequate remedy to try that question, by way of defence to any suit that may be brought against them by the trustee, if he shall bring such a suit without having given bond. *Bill dismissed.*



WILLIAM L. G. PIERCE, administrator, *vs.* BOSTON FIVE CENTS SAVINGS BANK.

Suffolk. March 15. — September 16, 1880.

ELIZABETH A. TURNER *vs.* RUFUS ESTABROOK, administrator, & others.

Suffolk. Nov. 21, 1879. — September 16, 1880.

- A deposit in a savings bank may be the subject of a gift *mortis causa*; and the gift may be proved by the delivery of the bank book, although unaccompanied by an assignment.
- A donee *mortis causa* of a savings-bank book may maintain an action, in the name of the administrator of the estate of the donor, and without his consent, against the bank to recover the amount deposited.
- It is no defence to an action, by a donee of a gift *mortis causa*, to obtain the gift, that the donee is also a creditor of the estate, and that the estate is insufficient to pay his claim, without including the gift in the assets, if he is the only creditor who has not been paid.
- If a savings bank agrees to pay a depositor a less rate of interest than six per cent, the plaintiff in an action to recover the deposit is only entitled to the rate agreed upon, to the date of the judgment.

A., in contemplation of death, delivered to B. a sealed package, informing B. that it contained money and savings-bank books, with directions what was to be done with the property. On A.'s death, B. opened the package and found therein a sum of money and certain savings-bank books, with a writing signed by A., stating where he wished to be buried, and that whatever was left, besides paying all bills and expenses, was to be divided among certain persons named. Held, that there was a valid gift *mortis causa* to B., in trust.

THE FIRST CASE was an action of contract brought by Martin A. Munroe, in the name of the administrator of the estate of William Green, Jr., to recover deposits in the defendant bank made by Green to the amount of \$600. Writ dated June 19, 1877. The bank defended the action at the request of the administrator. Trial in the Superior Court, without a jury, before Gardner, J., who allowed a bill of exceptions, in substance as follows :

There was evidence tending to show that the intestate delivered the bank book, issued to him by the defendant, to Munroe, for his own use, as a *donatio mortis causa*, but there was no assignment of the bank book by Green. Upon making the first deposit, Green subscribed to the by-laws of the defendant bank. Printed on the outside of the bank book was the direction, "If you lose this book, give immediate information to the treasurer;" and inside, among the printed by-laws, were the following: "Art. 8. It shall be the duty of the treasurer to enter all deposits and payments made to depositors in the books of the bank, and a duplicate of such entry in the book of the depositor, which shall be his voucher and the evidence of the amount deposited." "Art. 9. No person shall receive any part of his principal or interest without producing the original book."

It appeared that the estate of Green, including said deposits, amounted to \$1242.87, and that the debts were \$25.40, of which last sum \$25 was for the services of the doctor during Green's last illness, and forty cents for some tobacco, both of which items had been paid, and that the funeral and other expenses did not exceed \$150, unless the alleged donee, Munroe, was to be considered a creditor. Munroe testified that he had a legal claim against Green's estate of \$1300, for board furnished, and some expenses paid for Green; and on January 20, 1879, he commenced a suit against the administrator to recover said amount, which suit is now pending. Pierce was

appointed administrator of Green's estate on January 29, 1877, and the estate was represented insolvent in October, 1879, and commissioners were appointed by the Probate Court.

The defendant requested the judge to rule, as matter of law, as follows: "1. The delivery of the bank book to Munroe by the deceased in his last illness, even if made when he did not expect to recover, and if intended by the deceased as a *donatio mortis causa*, did not pass to Munroe any right to the deposit in the bank. 2. It appearing, from the testimony in the case, that the only property left by the deceased, including the bank deposit, amounted to \$1242.87, and that the deceased, at the time of the alleged gift, owed Munroe \$1800 in addition to debts to other persons; that the deceased was insolvent at the time of the alleged gift, and of his death, and the gift of the bank deposit, if good in other respects, as *donatio mortis causa* was void, because in fraud of creditors."

The judge declined so to rule, and found for the plaintiff for the amount of the deposits and the interest accumulated thereon, according to the terms of the deposits, down to the date of the writ, with simple interest at six per cent from the date of the writ, against the objection of the defendant, who contended that by the terms of the deposit the interest from the date of the writ should be, if anything, only at the rate of two per cent semiannually, being the rate payable according to the terms of the contract of deposit.

To the above refusals to rule, and to the allowance of interest at six per cent from the date of the writ, the defendant alleged exceptions.

C. F. Kittredge, for the defendant.

F. Ames, for the plaintiff.

THE SECOND CASE was a bill of interpleader, brought against Rufus Estabrook, administrator of the estate of Martha S. Howe, Samuel T. King, Horace H. King, Francis H. King, Persis E. King, Mary R. Rolfe and Persis F. Chase, to determine to whom the plaintiff should deliver certain moneys and bank books. The case was heard on the pleadings and proofs before *Endicott, J.*, who reported it for the determination of the full court, in substance as follows:

At the hearing, it appeared that Howe, the intestate, an unmarried woman, had worked in the millinery business, under the plaintiff's supervision, for two years and a half prior to January 1879, when she ceased labor, on account of ill health; that on March 16, 1879, the plaintiff, at Howe's request, went to her lodging-room to see her, and found that she had an ovarian tumor, and was about to go to the hospital to have an operation performed, and then feared she would never recover, and told the plaintiff that she had some savings-bank books and \$250 in money, which she wished the plaintiff to take in her charge. The plaintiff asked, "What do you want done with them, in case anything happens to you?" to which Howe replied, "I will tell you," and proceeded to say that she wished to then give the bank books and money to the plaintiff. The plaintiff refused to receive them in that way, and with Howe's verbal directions merely, and thereupon told Howe that, unless she would carefully seal up with wax the money and bank books, and would also write out her directions as to their disposal, the plaintiff would have nothing to do with them. Howe then replied that she would do as the plaintiff required with the bank books and \$250 in money, besides which she stated that she had \$50 which she would take to the hospital with her, and that, if she needed any more money, the plaintiff could bring it to her while in the hospital; but if she had no further need, it would be all there, together with the savings-bank books. The plaintiff then said, "Why do you give these things to me, rather than to some relative?" and Howe answered, "Because you are the only person I can trust to do with my things exactly as I have said." No question was made but that the gifts to the plaintiff were made in contemplation of death.

On March 17, 1879, the plaintiff went to the house where Howe lodged, and she then and there gave to the plaintiff a package sealed with wax, saying, "There are all the things we talked about yesterday, sealed exactly as you told me, with the directions what to do with them." The plaintiff took the package, and then rode in a carriage with Howe to the hospital. While in the carriage Howe said to the plaintiff, "Now you will take care of everything for me, won't you?" and

when the plaintiff inquired what she meant by everything, Howe replied, "Why, I mean everything, — all my things, as I have said." At the hospital Howe remained four days, when she died. While at the hospital, the plaintiff visited her every day. At one of these visits, Howe showed the plaintiff the keys to two trunks at her lodging-rooms, and to a trunk in her room at the hospital, and to her watch, and told the plaintiff which key was for each trunk, and which was for the watch.

After Howe's death, the plaintiff took possession of these three trunks, which contained wearing-apparel, and also of a gold watch and \$64 in money which Howe had with her at the hospital when she died. The plaintiff then opened the sealed package given to her on March 17, and thereafter kept in her possession, and found therein \$250 in money, and four books of deposit in different savings banks in Boston, showing deposits by Howe in these banks to the amount of \$2101.16, together with an envelope sealed with wax, and superscribed, "In case of death, the enclosed requests are to be carried out;" which envelope contained a paper on which was written and subscribed in Howe's handwriting, as follows: "If I never recover, I wish to be buried beside my dear father and mother in South Natick, with everything suitable; and whatever is left, besides paying all bills and expenses, to be divided between Mrs. H. P. Rolfe, of Concord, N. H., Mrs. Dexter Chase, of Lancaster, N. H., and Persis and Horace King, Samuel King, of Boston, also Francis King, also of Boston. M. S. Howe."

Up to this time, the plaintiff did not know the amount of the bank books in the sealed package, or the banks in which they were, but had been told by Howe the amount of the money therein. There was no assignment of the bank books other than as above stated. The bank books and money contained in said package are claimed on the one hand by the administrator, and on the other by the persons named in the writing made by Howe. The title of the administrator to the trunks, with their contents, the watch and \$64 in money, was not disputed.

The case was reserved, upon the question whether there was a valid *donatio mortis causa* of the savings-bank deposits, and

of the \$250 in money, or of either; such decree to be entered as law and justice might require.

O. Stevens, for the administrator.

Z. S. Arnold, for the other defendants.

ENDICOTT, J. It has been repeatedly held that a deposit in a savings bank may be the subject of a valid *donatio causa mortis*, as well as of a gift *inter vivos*, and that such a gift may be proved by the delivery of the bank book to the donee, or to a third person for the donee, accompanied by an assignment. *Kingman v. Perkins*, 105 Mass. 111. *Foss v. Lowell Five Cents Savings Bank*, 111 Mass. 285. *Kimball v. Leland*, 110 Mass. 325. *Sheedy v. Roach*, 124 Mass. 472. *Davis v. Ney*, 125 Mass. 590.

As there can be no manual delivery of the credit which the donor has in the bank, the delivery of the book, which represents the deposit, and is the only evidence in the possession of the donor of his contract with the bank, together with an order or assignment, operates as a complete transfer of the existing fund, and is all the delivery of which the subject is capable.

We have not had the question presented to us until now, whether the delivery of the book, without a written assignment or order, is sufficient to constitute a valid gift *causa mortis* or *inter vivos*. The question has, however, been decided in other jurisdictions in the affirmative.

It was held in *Parish v. Stone*, 14 Pick. 198, that the donor's own note, payable to the donee, was not the subject of a *donatio causa mortis*. But it was intimated in the opinion, that a promissory note of another person payable to bearer, or indorsed in blank, so as to pass by delivery, might be a good gift *causa mortis*, and that a mortgage given to secure it would pass as an inseparable incident to the debt, though not assigned, citing *Duffield v. Elwes*, 1 Bligh N. R. 497, and *Duffield v. Hicks*, 1 Dow & Cl. 1. See also *Runyan v. Mersereau*, 11 Johns. 534; *Chase v. Redding*, 13 Gray, 418; *Ford v. Stuart*, 19 Johns. 342.

In *Grover v. Grover*, 24 Pick. 261, the action was by an administrator, on a promissory note, which, as appears by the statement of facts, was secured by a mortgage. The note and

mortgage were given by the plaintiff's intestate to one Blanchard, in contemplation of death; without assignment. It was held that there may be a valid gift *inter vivos* of a promissory note, payable to the order of the donor, without indorsement or other writing by him. And it was said by Mr. Justice Wilde, in delivering the opinion, after reviewing the earlier English cases, "In coming to this conclusion, we concur with the decision in the case of *Wright v. Wright*, 1 Cowen, 598, wherein it was held that the gift and delivery over of a promissory note, *mortis causa*, is valid in law, although the legal title did not pass by the assignment." See *Harris v. Clark*, 3 Comst. 93. It was also decided that Blanchard, on the death of the donor, could maintain an action against the maker of the note in the name of the administrator; without his assent. It was not necessary to decide whether the gift of the mortgage security was valid, as the right to maintain the action did not depend upon that question, though *Duffield v. Elwes* was referred to, as deciding that the gift of the debt operated as an equitable assignment of the mortgage.

In *Sessions v. Moseley*, 4 Cush. 87, it was said that "a note of hand of a third person, a security for money, or a chose in action, however it may have formerly been considered, is now held to be the proper subject of such a gift." And in *Bates v. Kempton*, 7 Gray, 382, it was decided, on the authority of these cases, that, by the law of Massachusetts, a negotiable note is the proper subject of such a gift without indorsement, and that the donee may maintain an action on it in the name of the administrator of the donor without his consent. See also *Borneman v. Sidlinger*, 15 Maine, 429. So the delivery of bonds, or a policy of life insurance with the deposit note, have been held to constitute good gifts *mortis causa* without assignment of the instruments. *Snelgrave v. Baily*, 3 Atk. 214, per Lord Hardwicke. *Witt v. Amis*, 1 B. & S. 109. *Wells v. Tucker*, 3 Binn. 366. *Waring v. Edmonds*, 11 Md. 424.

The decision of Lord Hardwicke in *Ward v. Turner*, 2 Ves. Sen. 431, in which he held that the mere delivery of receipts for South Sea annuities was not sufficient to constitute a good gift *causa mortis*; distinguishing it from the case of *Snelgrave v. Baily*, was said by Mr. Justice Wilde, in *Grover v. Grover*, t

be technical and unsatisfactory, and to have no application to our laws, which place bonds and other securities on the same footing. In *Westerlo v. De Witt*, 36 N. Y. 340, the delivery of a certificate of deposit on the New York Life Insurance and Trust Company was held to be effectual, without a written assignment, to transfer the deposit itself to the donee as a *donatio causa mortis*. So a delivery to a donee of a savings-bank book containing entries of deposits to the credit of the donor, with the intent to give the donee the deposits represented by the book, has been held to constitute a complete gift of such deposits, and that such delivery vests the equitable title in the donee without assignment. *Hill v. Stevenson*, 63 Maine, 364. *Tillinghast v. Wheaton*, 8 R. I. 536. *Camp's appeal*, 36 Conn. 88. *Penfield v. Thayer*, 2 E. D. Smith, 305.

A savings-bank book has a peculiar character. It is not a mere pass-book, or the statement of an account; it is issued to the person in whose name the deposit is made, and with whom the bank has made its contract; it is his voucher, and the only security he has, as evidence of his debt. The bank is not obliged to pay to the depositor the money in its hands except upon presentation of the book; and if in good faith and without notice it pays the money deposited to the person who presents the book, although the book has been obtained fraudulently by him, the bank is not liable to the real depositor. *Sweeney v. Boston Five Cents Savings Bank*, 116 Mass. 384. *Wall v. Provident Inst. for Savings*, 3 Allen, 96. *Levy v. Franklin Savings Bank*, 117 Mass. 448. *Goldrick v. Bristol County Savings Bank*, 123 Mass. 320.

The book is the instrument by which alone the money can be obtained, and its possession is thus some evidence of title in the person presenting it at the bank. It is in the nature of a security for the payment of money; it discloses the existence and amount of the fund to the person receiving it, and affords him the means of obtaining possession of the same. We can have no doubt that a purchaser, to whom such a book is delivered without assignment, obtains an equitable title to the fund it represents; and a title by gift, when the claims of creditors do not affect its validity, stands on the same footing as a title by sale. *Grover v. Grover*, 24 Pick. 261.

In the first of the cases now before us, the delivery of the bank book to Munroe, by Green, in his last sickness, without a written assignment, made in contemplation of death, and with the intent thereby to transfer the deposit in the bank to Munroe, constituted a valid *donatio mortis causa*, and Munroe may maintain an action against the bank for the amount of the deposit, in the name of Green's administrator, without his consent.

The judge properly refused to rule, upon the facts presented, that the gift to Munroe made the estate insolvent, and was therefore void because in fraud of creditors.

It is true that a gift *mortis causa* cannot avail against creditors. In such case the donee is in the same position as legatees and heirs, for strictly speaking the only property which a person by gift *causa mortis* or by will can voluntarily dispose of, without consideration, is the balance left after the payment of his debts. Munroe therefore, as donee *causa mortis*, took his title to the bank deposit subject to the right of the administrator to reclaim it, if required for the payment of debts. *Mitchell v. Pease*, 7 Cush. 350. *Chase v. Redding*, 18 Gray, 418. But, upon the facts in this case, Munroe is the only person against whom, as creditor, the gift would be void, and it cannot be said to be a fraud as against him.

It appears that Pierce was appointed administrator in January 1877, and that the estate of Green, not including the deposits in the bank, amounted to \$642.87. This action was brought in June 1877. In January 1879, Munroe brought an action against the administrator, alleging that Green's estate was indebted to him in the sum of \$1300, for board of Green and other expenses paid for him. Pierce thereupon represented the estate as insolvent in October 1879, and commissioners were appointed, but no further action seems to have been taken. The only debts besides the claim of Munroe amounted to \$25 for the doctor's bill during Green's last sickness, and forty cents for some tobacco, which have both been paid. The funeral and other expenses did not exceed \$150, but these are not debts within the meaning of the statute in regard to the settlement of the estates of deceased persons. The expenses of the funeral, and of the last sickness, and the expenses attending the administration, we must presume to have been paid before the estate was declared insolvent. The

doctor's bill would come within this category. Gen. Sts. c. 99, § 1. Munroe therefore was the only creditor. If he should establish his claim against the estate for \$1300, he would be entitled only to what remains of the \$642.87 after the above payments, and could make no claim against the administrator for funds in his own hands, by virtue of the gift from Green. It would be an idle ceremony to have the bank deposit paid over to Pierce, the administrator, in order that he should deduct from it the claim of Munroe, pay him, and also return to him the balance.

As we understand the bill of exceptions, by the terms of the contract upon which the deposit was held by the defendant, the rate of interest thereon is four per cent *per annum*, payable semiannually. This action is brought upon that contract, and the damages for the nonpayment of the money are to be estimated at that rate, till the debt is merged in the judgment. *Brannon v. Hursell*, 112 Mass. 63. *Union Institution for Savings v. Boston*, ante, 82. *Miller v. Burroughs*, 4 Johns. Ch. 436. *Van Beuren v. Van Gaasbeck*, 4 Cowen, 496. The ruling of the presiding judge, that the plaintiff was entitled to six per cent from the date of the writ, was erroneous. If the plaintiff will remit the two per cent erroneously included in the verdict, the exceptions may be

Overruled.

In the second case, the delivery to the plaintiff by Miss Howe of the sealed package containing \$250 in money and four bank books, accompanied by directions as to the disposition of the same in case of her death, thus manifesting her intention of making a final disposition of the property contained in the package, was a valid *donatio mortis causa*; and the plaintiff held the same in trust after the death of the donor, upon the terms and limitations prescribed by the donor. *Clough v. Clough*, 117 Mass. 83. *Sheedy v. Roach*, 124 Mass. 472. In the opinion of a majority of the court, the donor had the right thus to dispose of this particular property. The plaintiff knew that the package contained money and bank books; and it is immaterial that she did not know the amounts due upon the books, or the names of the banks which held the several deposits. She is bound to dispose of the money, and the deposits in the banks represented by the books, as directed by the donor, subject to any claim the

administrator may have for the payment of debts and necessary expenses of administration. *Mitchell v. Pease*, 7 Cush. 350. *Chase v. Redding*, 18 Gray, 418. *Davis v. Ney*, 125 Mass. 590.

The terms of the decree must be settled before a single judge.
Decree accordingly.

BOSTON MUSIC HALL ASSOCIATION vs. BARNEY CORY
& others.

Suffolk. March 17. — Sept. 16, 1880. AMES & LORD, JJ., absent.

A decree of a single justice of this court sitting in equity, in a cause heard before him on oral evidence, and which is heard in this court on appeal upon a report of the same evidence only, will not be reversed on a question of fact, unless it clearly appears to be erroneous.

A sale of stock in a corporation is valid against a subsequent attaching creditor of the seller, although no transfer of the stock is made on the books of the corporation, in the absence of an express provision of statute, or of the charter of the corporation, requiring such transfer to be made.

COLT, J. In 1874, Howard L. Hayford sold five shares in the stock of the Boston Music Hall Association to his brother Nathan H. Hayford, to whom he delivered a stock certificate, and upon which he indorsed and signed a written transfer in the usual form. No transfer was made on the books of the corporation, and there was no provision in the charter or by-laws of the association requiring it. It was not until after the shares were levied on as the property of Howard L., in May 1878, that the corporation was notified of the alleged sale and transfer to Nathan H. In the mean time Howard L., with the knowledge of his brother, collected the annual dividends declared on the stock, attended meetings of the stockholders, and served upon committees appointed at such meetings. Under the levy made in 1878, Barney Cory bought the stock as the property of Howard L.; and the question presented by this bill of interpleader is, which of the two acquired the title.

The case comes up on an appeal from the decree of a single judge in favor of Nathan H. Hayford, accompanied by a report of the evidence taken at the hearing. In the first place, it is contended that the evidence fails to show that the stock was

sold and assigned to Nathan H. in good faith at any time before the levy. Upon this question of fact, the decision of the single judge will not be reversed, unless it clearly appears to be erroneous. *Reed v. Reed*, 114 Mass. 372. *Montgomery v. Pickering*, 116 Mass. 227.

The only evidence of the transaction in 1874 comes from the two Hayfords, who were the parties to it. But we cannot say that the fact that the apparent ownership remained unchanged for such an unusual length of time upon the books of the corporation, and that Howard L. received the dividends and continued to act as the real owner, is sufficient to lead us to believe that the judge erred in not treating it as sufficient to overcome the positive evidence of a valid sale of the property, coming from the two witnesses who were before him, and of whose truthfulness he had the best opportunity to judge.

In the next place, it is strenuously urged that, by force of the various statutes of this Commonwealth relating to the ownership and transfer of stock in corporations, authorizing the attachment of shares, requiring returns to the Secretary of the Commonwealth, and imposing a personal liability on stockholders for the debts of the corporation, there can be no transfer of stock, valid against the claims of an attaching creditor, unless such transfer be recorded in the books of the corporation. Gen. Sts. c. 68, §§ 10, 12; c. 123, §§ 59-61; c. 133, § 46. St. 1864, c. 201. The intention of the Legislature, it is said, must have been to provide for the owners of stock a convenient and uniform method of transferring title on the books of the corporation, which should be the only valid transfer as to creditors, and others interested; and, although the statutes have not provided in express terms that, as to creditors, transfers shall not be valid till they are so recorded, yet such, it is contended, is the necessary implication, for otherwise the design of the statutes, requiring registration and making the shares liable to be taken for debts, would be defeated. But this consideration is not sufficient to control the law as long since settled by the decisions of this court. It requires a clear provision of the charter itself, or of some statute, to take from the owner of such property the right to transfer it in accordance with known rules of the common law. And by those rules the delivering of a stock certificate, with a written

transfer of the same to a *bona fide* purchaser, is a sufficient delivery to transfer the title as against a subsequent attaching creditor. *Sargent v. Essex Marine Railway*, 9 Pick. 201. *Sargent v. Franklin Ins. Co.* 8 Pick. 90. *Fisher v. Essex Bank*, 5 Gray, 373. *Dickinson v. Central National Bank*, ante, 279.

It would not be in accordance with sound rules of construction to infer, from the provisions of several different statutes passed for the purpose of obtaining information needed to secure the taxation of such property, or for the purpose of subjecting stockholders to a liability for the debts of a corporation, or for protecting the corporation itself in its dealings with its own stockholders, that the Legislature intended thereby to take from the stockholder his power to transfer his stock in any recognized and lawful mode. If a change in the mode of transfer be desirable, for the protection of creditors, or for any other reason, it is for the Legislature to make it by clear provisions, enacted for that purpose.

We see nothing in the facts which can be held to deprive Nathan H. Hayford of the stock in question, on the ground that he is chargeable with laches in not causing the transfer to be sooner recorded, or that he is now estopped from setting up his title to the shares in his possession. It must be taken, upon the findings of the judge, that Nathan H. bought these shares in good faith in 1874; and that all which the law required was done to vest a perfect title in him, as against an attaching creditor of Howard L. He was under no legal duty to have the transfer recorded in order to perfect his title as against strangers, and he can be charged with no neglect or laches which would involve the forfeiture of his title.

The evidence in the case does not require us, against the findings of the single judge, to find that Nathan H. is estopped to set up his title against a creditor of Howard L. The acts and declarations of the latter, after the sale, would not affect the title, except so far as they were authorized by Nathan H., and there is nothing to show any act or declaration authorized by the latter, with intent to give a false credit to Howard L., or that any creditor of his was in fact defrauded. *Decree affirmed.*

F. C. Welch, for the attaching creditor.

J. P. Treadwell, for the transferee.

**MANUFACTURERS' NATIONAL BANK vs. ABLIAH THOMPSON, 3d.
& others.**

Suffolk. March 10. — Sept. 18, 1880. ENDICOTT & SOULE, JJ., absent.

In an action against the indorser of a promissory note, payable at the plaintiff bank and discounted by another bank, it appeared that, when the note became due, the last-named bank charged it to the plaintiff bank and sent it through the clearing-house for payment; that the plaintiff's teller by mistake, thinking that the maker of the note was in funds at the plaintiff bank, stamped the word "paid" on the face of the note; that the mistake was soon discovered, and, before the close of banking hours on the same day, both the other bank and the indorser were notified of it, and the note was duly protested; and that a dispute between the two banks, as to whether the rules of the clearing-house had been complied with, was terminated by a payment of the amount of the note to the other bank by the plaintiff, without any waiver of its legal rights, and, at the trial, the other bank disclaimed all title or interest in the note. The judge, who tried the case without a jury, found that the note was stamped by mistake as paid; that this act did not amount to a payment of the note, and was not intended as such; that the money paid by the plaintiff to the other bank was not intended and did not operate as a payment of the note; and that the plaintiff had sufficient title and ownership of the note to enable it to bring this action. *Held*, that the defendant had no ground of exception. *Held, also*, that the defendant could not avail himself of the rules of the clearing-house, to which he was not a party, in defence of the action.

COLT, J. This action is against the indorsers of a promissory note, which was made payable at the plaintiff bank, and which was discounted by the Faneuil Hall Bank. When it became due, the last-named bank charged it to the plaintiff bank, and sent it through the clearing-house for payment. The plaintiff's teller, by mistake, thinking that the makers were in funds at his bank, stamped the word "paid" on the face of the note. The mistake was soon discovered, and, before the close of banking hours on the same day, both the other bank and the indorsers were notified of it, and the note was duly protested.

There was then a dispute between the banks, as to whether, under the rules of the clearing-house, the plaintiff was not bound to return the note, if not paid, by a given hour of the day in which it was due; and it was contended that, as the note was not so returned, it had become the property of the plaintiff. This dispute was terminated by a payment to the Faneuil Hall Bank of the amount of the note, which was made by the plaintiff expressly without any waiver of its legal rights;

and, at the trial, the Faneuil Hall Bank disclaimed all title or interest in the note.

The case was tried without a jury, and the judge found that the note was stamped by mistake as paid; that this act of stamping, with the failure to return it, did not amount to payment of the note, and was not intended as such; and that the money paid by the plaintiff to the other bank was not intended and did not operate as a payment of the note. He also found that the plaintiff had sufficient title and ownership of the note to enable it to bring this action.

Two questions only are presented. The first is, whether the evidence would justify the judge in finding that the note was not paid; and next, whether it would justify him in finding that the plaintiff was entitled to bring this action.

As to the first, there is no pretence that the note has ever been paid by the makers or indorsers, and there is nothing in the rules of the clearing-house association, which the defendants, as indorsers of the note, can set up by way of forfeiture or estoppel to defeat the right of the holder to recover against them. The rules of the association are adopted solely for the purpose of facilitating exchanges among the banks. The defendants are not members or parties to its regulations, and, whatever effect is to be given to them as between the banks, the defendants are not in a situation to claim the benefit of them. *Overman v. Hoboken City Bank*, 1 Vroom, 61. There was no evidence that the defendants, as indorsers of the note, suffered any loss, or changed their situation, in respect to the makers of the note, by the mistake of the plaintiff. The note was regularly protested, and notice to the indorsers given. Their rights were in no way prejudiced. *Merchants' National Bank v. National Eagle Bank*, 101 Mass. 281. *Troy City Bank v. Grant*, Hill & Denio, 119. See also *Whiting v. City Bank*, 77 N. Y. 363. The finding of the court that the note is still an outstanding unpaid note was therefore clearly right.

Nor is there any doubt that the judge properly found and ruled that the plaintiff had sufficient title to maintain this action. The note was indorsed in blank, and passed by delivery. The plaintiff is in possession of it, and, even if the Faneuil Hall Bank is regarded as the real party in interest,

yet it is settled that an action may be maintained in the name of the holder of such a note who came into possession of it with the assent of the party in interest. *Beekman v. Wilson*, 9 Met. 434. *National Pemberton Bank v. Porter*, 125 Mass. 333. *Spofford v. Norton*, 126 Mass. 533. But the evidence here shows that the plaintiff has both the legal and beneficial interest as sole owner. No one else claims any interest in it. The transaction shows that it was intended by the Faneuil Hall Bank, on receiving the amount paid by the plaintiff, to leave the note in the hands of the latter as a valid existing security. *Troy City Bank v. Grant*, above cited. *Watervliet Bank v. White*, 1 Denio, 608.

Judgment on the verdict.

B. E. Perry & S. W. Creech, Jr., for the defendants.

J. D. Ball, for the plaintiff, was not called upon.



ALBERT J. WRIGHT vs. BOSTON AND MAINE RAILROAD.

Suffolk. Nov. 14, 19, 1879. — Sept. 22, 1880. LORD & SOULE, JJ., absent.

A person, who is injured while crossing the tracks of a railroad corporation at a place not a highway, and where no inducement is held out to him to cross by the corporation, cannot maintain an action against the corporation for such injury.

A person, who is injured by a train of cars at a place where a highway crosses a railroad at grade, cannot maintain an action against the railroad corporation, if it appears in evidence, undisputed, that he attempted to cross on foot, without looking to see if a train was coming.

An action for personal injuries cannot be maintained against a railroad corporation, under the St. of 1874, c. 372, § 164, if the declaration does not allege that the accident occurred upon a crossing of a highway at grade, that the statutory signals required at such crossings were neglected by the defendant, and that such neglect contributed to the injury.

TORT. The declaration contained two counts. The first count was as follows: "The plaintiff says that while he was travelling on Cambridge Street in the city of Somerville, in the exercise of due and ordinary care, the defendant, by its agents and servants, grossly and carelessly ran and drove an engine, attached to a long train of cars, upon and over him, wounding him in his

head, breaking his legs and arms, and greatly injuring him in his person." The second count was for an injury received while on the premises of the defendant.

Trial in this court, before *Ames, J.*, who withdrew the case from the jury, and reported it for the consideration of the full court. The facts appear in the opinion.

D. F. Crane & R. Lund, for the plaintiff.

S. Lincoln, Jr., for the defendant.

COLT, J. The plaintiff at the time of his injury was not a passenger going to or from a train on the defendant's road. He was either using the premises of the defendant's station at East Somerville for his own convenience, as affording him a shorter way from Perkins Street on the north, by Cambridge Street on the south, to the station of the Eastern Railroad, or else, after so using the premises, he was attempting, on reaching Cambridge Street, to pass diagonally both across the highway and across the defendant's tracks, towards the last-named station, for the purpose of taking passage over the latter road in a train then just arriving.

The tracks of the two railroad corporations at this point are parallel, and the station-houses are built nearly opposite to each other. The platform at the defendant's station extends from street to street, but there is nothing in the arrangement of the platforms or buildings which indicates that they were intended for the use of passengers of the other road going to and from its station. As was said in *Johnson v. Boston & Maine Railroad*, 125 Mass. 75, 79, with reference to a similar accident to a person who was using these very premises in the same way, "the defendant was not bound to do any act or service for the plaintiff, nor to fulfil any contract with her, relating to the use by her of its lands." "In going upon the railroad track in order to make a short cut to the station of the Eastern Railroad, she assumed all risks of bad condition of the platforms and of the road-bed, and of the running of engines and cars." It was accordingly held in that case that the plaintiff, who was injured through the negligence of the corporation while crossing the tracks, when she should have crossed in the highway, was a trespasser, and could not recover without evidence that the defendant's negligence was wilful.

In the case at bar, there was some evidence offered tending to show that the plaintiff was injured, not on the premises of the corporation, but after he reached Cambridge Street, and while he was crossing both that street and the tracks of the railroad, in going towards the Eastern Railroad station. It is true that, if the case had been submitted to the jury, they might have found that he was injured within the limits of the highway. But in either aspect of the case, and without reference for the present to the provisions of the St. of 1874, *c.* 372, § 164, we are of opinion that the evidence entirely fails to show that the plaintiff was in the exercise of due care. The uncontroverted facts show that he was negligent. He testified that he walked down the platform of the defendant's station from Perkins Street about half-way, intending to take the train on the Eastern Railroad, which was about due, and had his mind on that, having no occasion to know anything about the train on the Boston and Maine Railroad; that, after a short stop, he walked down the platform but could not tell how far, and did not remember that he walked off at Cambridge Street; that he saw the train on the Eastern Railroad coming fast, and knew it was time to be off, and could not tell whether he stepped off the platform, or whether he got to the end of it or not, and did not remember leaving the platform at all; that the last he did remember was that he was on the platform going towards the train on the Eastern Railroad; that he looked to this train and his attention was directed right to it; that he did not look either way on the Boston and Maine Railroad, or look back, or see or hear anything whatever of any train when he was on the rails of the defendant's road; that he must have seen if he had looked, but his attention was drawn right to the train on the Eastern Railroad, and, having no occasion to look at anything else, he paid no attention to anything about the defendant's road, and did not notice that the gate across the highway was closed, or whether there was any flagman on the street, or whether any signal or means of warning was provided by the defendant corporation.

The effect of this evidence is not controlled or contradicted by any other evidence in the case. It shows that the plaintiff was attempting to cross the tracks of a railroad, which he knew were

in constant use for passing trains, at a place with which he was perfectly familiar, not merely without affirmative proof of care commensurate with the danger to which he was exposed, but with positive proof of negligence on his part. He was not allured into the danger by any act or declaration of the defendant or its agents, or by any peculiar construction or arrangement of the premises. He was not misled by any order or signal. The crossing was closed by a gate, but he paid no attention to anything about the railroad which he was passing over, or to any signal or means of warning. Such conduct is condemned by the general knowledge and experience of all prudent men, and is conclusive on the question of due care. *Allyn v. Boston & Albany Railroad*, 105 Mass. 77. *Butterfield v. Western Railroad*, 10 Allen, 532. *Bancroft v. Boston & Worcester Railroad*, 97 Mass. 275. *Burns v. Boston & Lowell Railroad*, 101 Mass. 50. Nor do we see any evidence which would justify a finding that the plaintiff was injured by the reckless and wanton misconduct of those employed in the management of the train.

By the St. of 1874, c. 372, § 164, reënacting the St. of 1871, c. 352, it is provided that, if a person is injured by a collision at a railroad crossing, and it appears that the corporation neglected to give the signals by bell and whistle required by statute, the corporation shall be liable, unless it is shown that, in addition to mere want of ordinary care, the person injured is guilty of gross or wilful negligence, or was acting in violation of law. If this enactment changes the law, and if the plaintiff is entitled to the benefit of it as a traveller in the highway, notwithstanding the direction in which he was going, and the fact that he came upon the crossing not from the highway, but from the premises of the defendant, yet we are of opinion that, under his declaration, he is not entitled to recover in this action by virtue of the statute under consideration.

The declaration contains two counts. The first is for injury received by the plaintiff on Cambridge Street, from the engine and cars of the defendant. The other is for an injury received by him while on the premises of the defendant. He relies on the first count only as sufficient under this statute; but the difficulty is that there is no allegation therein that the collision

occurred upon a crossing of a highway at grade, or that the statutory signals required at such crossings were neglected by the defendant, or that such neglect contributed to the injury. These allegations are essential if the plaintiff seeks to maintain his action upon this statute. They are necessary because, on the facts here disclosed, there is no other ground of recovery left. *Williams v. Hingham & Quincy Bridge & Turnpike*, 4 Pick. 341. It is well settled that, in declaring upon a cause of action arising under a statute, the plaintiff must state specially every fact required by the statute to fix the liability. And it was recently held by this court, in accordance with these rules of pleading, that, if an indictment against a railroad corporation, to recover for the use of the widow and children for the loss of a life at a grade crossing, alleged, as the only act of negligence, that the locomotive engine was run rashly, without watch, care and foresight, and with great and improper speed, evidence was not admissible to show that there was neglect to ring the bell or sound the whistle, because such negligence was not sufficiently alleged. *Commonwealth v. Fitchburg Railroad*, 126 Mass. 472. It follows, by the terms of the report on which the case has been reserved, that there must be

Judgment for the defendant.

NATIONAL BANK OF COMMERCE vs. CHARLES W. HUNTINGTON & trustee.

Suffolk. Nov. 17, 1879. — Sept. 27, 1880. MORTON & SOULE, JJ., absent.

A railroad corporation, created by the laws of another State, which has an office in this Commonwealth for the convenience of its stockholders and for the better management of its finances and other business, where its principal officers are to be found, and where it carries on such business as is usually carried on in the office of the president and treasurer of a railroad corporation, has a usual place of business in this Commonwealth, within the meaning of the St. of 1870, c. 194, and may be summoned as trustee by process served upon its treasurer.

TRUSTEE PROCESS. Writ dated March 25, 1878. The Little Rock and Fort Smith Railway, summoned as trustee by an

attested copy of the writ being served upon its treasurer, appeared specially, and filed an answer in abatement, alleging that it was a corporation created by the laws of the State of Arkansas for the purpose of owning and maintaining a railroad entirely within the limits of that State, and had no legal existence or domicile out of that State; that, in accordance with the laws of that State, a majority of its directors were residents and citizens of that State, and the offices of its president, secretary and treasurer were there established; that its usual places of business were in the city of Little Rock, and upon the line of said railroad in said State; that a large majority of the stockholders of said corporation resided in the Eastern States, and four of the directors and the president and secretary were citizens of Massachusetts; that, for the convenience and accommodation of such directors, officers and stockholders, the corporation had an office or room in the city of Boston in this Commonwealth, at which office or room returns of the operations of its railroad and of the sales of its lands were received from its officers in Arkansas, also letters, reports and communications, and payment made of the interest upon the bonds issued by said railway, transfers of shares of stock received and transmitted to the offices of the corporation at Little Rock, and certificates of stock issued, but the transfer office of said company with the books pertaining thereto was established and kept at Little Rock, as required by the laws of the State of Arkansas; that it had no usual place of business in Boston, or within this Commonwealth, except as above stated; that it had no property within this Commonwealth, except the usual and ordinary furniture pertaining to an office or room of the nature above described; that it had no legal existence in this Commonwealth, nor usual place of business therein; and that no sufficient and legal service of the writ had been made upon said corporation.

The case was heard before *Endicott, J.*, and reported upon certain facts, which appear in the opinion, for the consideration of the full court, upon the question whether the corporation could be summoned as trustee in this Commonwealth. If it could, the trustee was to be ordered to answer over; otherwise, to be discharged.

S. W. Bates, for the trustee.

J. B. Warner, for the plaintiff.

ENDICOTT, J. The principal question to be determined in this case is whether the Little Rock and Fort Smith Railway, a corporation established by the laws of the State of Arkansas, has a usual place of business in this Commonwealth, and can be summoned by the plaintiff as trustee.

It was held, in an early case, that a person residing in another State could not be summoned as trustee, although service of process was made upon him in this Commonwealth. *Tingley v. Bateman*, 10 Mass. 343. *Ray v. Underwood*, 3 Pick. 302. *Nye v. Liscombe*, 21 Pick. 263. *Hart v. Anthony*, 15 Pick. 445. Corporations within the Commonwealth could not be summoned as trustees, until the passage of the St. of 1832, c. 164 and it has been held, following the cases above cited, that this statute has no application to foreign corporations, although the principal officers of such a corporation resided here, and the corporation had leased property, and had agents here to manage its affairs. *Danforth v. Penny*, 3 Met. 564. *Gold v. Housatonic Railroad*, 1 Gray, 424. *Larkin v. Wilson*, 106 Mass. 120. It may also be observed that a foreign corporation, having property in this State, may be sued here, and its property is subject to attachment, in like manner as residents of other States may be sued, and their property here attached, although the corporation is not found in the State, and has no agent or usual place of business here. St. 1839, c. 158. Gen. Sts. c. 68, § 15. And it was decided in *Andrews v. Michigan Central Railroad*, 99 Mass. 534, that service on the treasurer of the defendant, at its office in Boston, was not sufficient, and, as there was no attachment of property, the action was dismissed. The question does not seem to have been distinctly considered in that case, whether a corporation, having a usual place of business here for the transaction of its business, may be treated as found here, and therefore liable to suit in our courts. There has been no change in this statute.

In this condition of the law, the Legislature amended the Gen. Sts. c. 142, § 1, by providing that non-residents and corporations established by the laws of another State may be summoned as trustees, if they have a usual place of business in this

Commonwealth. St. 1870, c. 194. Thus far our courts have taken jurisdiction in actions at law against foreign corporations only when an attachment has been made of their property found in this Commonwealth. See *Silloway v. Columbia Ins. Co.* 8 Gray, 199. And such corporations can only be summoned as trustees when they have a usual place of business here.

Upon a careful examination of the facts found by the report, we are of opinion that the Little Rock and Fort Smith Railway has a usual place of business in Massachusetts. By the laws of Arkansas, a majority of its directors must be resident therein, and the offices of its president, secretary and treasurer shall be established within the State, and the books and records of its proceedings shall be kept at such office, and be open to the inspection of its stockholders. The Constitution of that State also requires that every railroad company shall maintain an office in the State, where transfers of its stock shall be made, and books shall be kept, showing the amount of capital stock paid in, the amount owned by each stockholder, transfers of stock, the names of its officers and their places of residence. The report finds that the company has complied with all these provisions. It has its principal office in Arkansas, at Little Rock. It also has an office in Boston, occupied by its president and treasurer, and a clerk, all of whom are residents in Massachusetts, and the furniture in the office is the property of the company. This office consists of two rooms; upon the door of one is the sign, "Little Rock and Fort Smith Railway, Horace B. Wilbur, Treasurer," and on the door of the other, "Little Rock and Fort Smith Railway, President's Office;" and all the official correspondence of the treasurer is dated at the office of the Little Rock and Fort Smith Railway, 150 Devonshire Street, Boston. At this office the treasurer performs all his official duties. He has been treasurer since 1875, but since 1876 he has not been in Arkansas. The company has a bank account in Boston; and nearly all its bonds and other securities are kept in Boston, excepting notes received for sales of land, and certain contracts, which are kept in Little Rock. All its net earnings are forwarded to the Boston office, by the subordinate officers at Little Rock; daily reports of its earnings, and of its sales of lands, and statements, from time to time, of the money received and expended in the operation

of the road, and on account of construction, are also transmitted to Boston, and are open to the inspection of the stockholders, a large majority of whom reside in the Eastern States. Certificates of stock are issued and transfers made at the Boston office, but such issues and transfers are sent to Little Rock, and also recorded there. In Boston, also, the bonds and coupons of the company are payable, and promissory notes and certificates are exchanged for certain of its coupons. In the usual course of business, payment to the defendant for his legal services to the company would be made at Boston or at Little Rock. Some books are kept at Little Rock, relating to the affairs of the company, which are not duplicated in Boston, but no books are kept in Boston which are not duplicated in Little Rock.

It is evident from these facts, that this company, for the convenience of its stockholders, and for the better management of its finances and other business, has established an office in Boston, where its principal officers are to be found, through whom the subordinate officers in Arkansas are directed and controlled; and where it carries on such business as is usually carried on in the office of the president and treasurer of a railroad corporation. We know of no reason why a foreign corporation may not do this; and it was not contended at the argument that the company had no power to establish and maintain in Boston such an office. While it exists under the laws of Arkansas, it may transact business and have places of business elsewhere, unless prohibited by its charter or by local laws. *Lafayette Ins. Co. v. French*, 18 How. 404. *Ex parte Schollenberger*, 96 U. S. 369. *Hayden v. Androscoggin Mills*, 1 Fed. Rep. 93. *Newby v. Von Oppen*, L. R. 7 Q. B. 293. *Carron Iron Co. v. Maclaren*, 5 H. L. Cas. 416, 459. *Moulin v. Trenton Ins. Co.* 4 Zab. 222. *Phillipsburgh Bank v. Lackawanna Railroad*, 3 Dutch. 206. *Libbey v. Hodgdon*, 9 N. H. 394. *March v. Eastern Railroad*, 40 N. H. 548. *Selma, Rome & Dalton Railroad v. Tyson*, 48 Ga. 351. *Farnsworth v. Terre Haute, Alton & St. Louis Railroad*, 29 Misso. 75. *Lawrence v. Ballou*, 50 Cal. 258. *Western Union Telegraph v. Pleasants*, 46 Ala. 641. See also *Rhodes v. Salem Turnpike*, 98 Mass. 95. We can therefore have no question that the company's place of business in Boston is a usual place of business in this Commonwealth, within the meaning of the St. of 1870, c. 194.

Some other objections to holding this company as trustee have been urged in argument, and remain to be considered.

The language of the statute is broad and unqualified, and we do not consider that it was the intention of the Legislature to confine its application to those foreign corporations which under our statutes have an agent appointed to receive service.

Nor is there any difficulty about service. By the St. of 1870, c. 194, the word "corporation" in the Gen. Sts. c. 142, § 1, shall include corporations established under the laws of other States, and having usual places of business within this Commonwealth; and the necessary implication is that service may be had upon them, in the manner prescribed in § 5 for service upon those who may be summoned as trustees under § 1; that is, as provided in the Gen. Sts. c. 123, § 30. In the case at bar, the service was made upon the treasurer of the company, who was an officer having charge of its business in Boston.

There is no doubt that a State may prohibit foreign corporations from transacting business within its limits, or it may permit them to do so, upon such proper terms and conditions as it may prescribe. It is clearly to be implied from the statute that a foreign corporation may have a usual place for the transaction of its business within this Commonwealth; and it is equally clear that, in exercising such privilege, it is subject to the provision of this statute, and is liable to be summoned as trustee. It was said by Mr. Justice Wells, in *Attorney General v. Bay State Mining Co.* 99 Mass. 148, that "a corporation which seeks, by its agents, to establish a domicile of business in a State other than that of its creation, must take that domicile, as individuals are always understood to do, subject to the responsibilities and burdens imposed by the laws which it finds in force there." And in *Lafayette Ins. Co. v. French*, 18 How. 404, Mr. Justice Curtis, after referring to the general doctrine, that a State may impose conditions upon such corporations as it allows to transact business within its limits, remarks, "and these conditions must be deemed valid and effectual by other States, and by this court, provided they are not repugnant to the Constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by all others, or that principle of natural

justice which forbids condemnation without opportunity for defence."

If a corporation may be sued in a State where it has a usual place of business, or where it has property subject to attachment, there is no reason why it may not be summoned as trustee; and if such trustee is charged, we must presume that the judgment will protect it in other States as well as in Massachusetts, if it should hereafter be sued by the creditor for whom it is summoned as trustee. *Hull v. Blake*, 18 Mass. 158. *Parker v. Danforth*, 16 Mass. 299. *Barrow v. West*, 23 Pick. 270. *Ocean Ins. Co. v. Portsmouth Railway*, 3 Met. 420. A trustee process pending in one State has been held a good defence to a subsequent action brought in another jurisdiction, by the defendant in the first suit, against his debtor, the trustee. *Embree v. Hanna*, 5 Johns. 101. So a subsequent trustee process in one State cannot defeat an action previously commenced against the trustee by his creditor in another State. *Wallace v. M'Connell*, 13 Pet. 136. And it was said in the last case, "If the attachment had been conducted to a conclusion, and the money recovered of the defendant before the present suit, there can be no doubt that it might have been set up as a payment upon the note in question." See also *Whipple v. Robbins*, 97 Mass. 107. *American Bank v. Rollins*, 99 Mass. 313. We cannot presume that the trustee in this case, if charged, will fail to comply with the judgment of the court, and it is unnecessary now to consider in what manner the judgment could be enforced, if the trustee fails to pay it.

It is also contended that the St. of 1870 undertakes to extend the trustee process beyond the system previously existing; and as the trustee could not be sued in our courts on the ground that it had a usual place of business here, but could only be held if it had property here liable to attachment, therefore the plaintiff would have greater rights against the trustee than the defendant has, which would be inconsistent with the general rule applicable to trustee process. But this rule is subject to many exceptions. *Comstock v. Farnum*, 2 Mass. 96. *Clark v. Brown*, 14 Mass. 271. *Hooper v. Hills*, 9 Pick. 435. *Whitney v. Munroe*, 19 Maine, 42. Admitting that the creditor of a foreign corporation can obtain jurisdiction over it, under our law, only by an attachment of its property here, yet it is within

the power of the Legislature to subject a foreign corporation to trustee process in another manner, and to provide that it may be summoned as trustee of its creditor, in an action against its creditor, if it has a usual place of business in this Commonwealth. In either aspect, the courts have jurisdiction over foreign corporations. In the case at bar, the trustee could have been sued by the defendant here, for the facts find that, when this action was brought, it had property within this Commonwealth; and we cannot say that his remedy would not have been as complete against the trustee as the plaintiff can have in this case.

Trustee to answer.

JAMES CALNAN & another vs. ANDREW TOOMEY & another.

Middlesex. January 13. — September 9, 1880.

A notice to a creditor, reciting that a person "arrested on execution in your favor desires to take the oath for the relief of poor debtors," and appointing a time and place for his examination, is sufficient, although the debtor was arrested on mesne process only.

CONTRACT upon a poor debtor's recognizance entered into, under the Gen. Sts. c. 124, § 10, by the first-named defendant as principal and the other defendant as surety, and containing the usual conditions. The case was submitted to the Superior Court, and, after judgment for the plaintiffs, to this court on appeal, on agreed facts, in substance as follows:

On November 13, 1875, Toomey was arrested on mesne process, and on November 17 entered into the recognizance declared on. On December 3, at the debtor's request, a magistrate issued a notice to the plaintiffs, reciting that the debtor "arrested on execution in your favor desires to take the oath for the relief of poor debtors," and appointing a time and place for his examination. This was the only notice given. There was no judgment and no execution, and no arrest upon any execution. The creditors did not appear, and the debtor was discharged without any examination. The plaintiffs had no other claim or suit against the debtor except the one upon which he was arrested.

If, upon these facts, the plaintiffs were entitled to recover, judgment was to be entered for them in the sum of \$193.56, with interest; otherwise, judgment for the defendants.

A. V. Lynde & W. P. Harding, for the plaintiffs.

G. S. Scammon, for the defendants.

SOULE, J. The notice to the plaintiffs was sufficient. The only error in it was in the statement that the person who wished to take the oath for the relief of poor debtors was arrested on execution, when, in fact, he was arrested on mesne process. This error had no tendency to mislead the plaintiffs, because Toomey had been arrested on only one process in their favor, and no other process had been issued against him in their favor. The notice showed that the application to take the oath was made by a debtor, who was correctly named, who was under arrest on civil process issued in behalf of the plaintiffs. They would not have been better informed of the facts which it was important for them to know, if the process on which the arrest was made had been correctly described, with the date and the amount of the *ad damnum* fully stated. Under these circumstances, we think that the notice was substantially in the form prescribed by the statute. Gen. Sts. c. 124, § 12. The error is no more serious than existed in several notices which were held good on the ground that, notwithstanding the errors, the party entitled to notice could not have been misled. *Collins v. Douglass*, 1 Gray, 167. *Pierce v. Phillips*, 101 Mass. 313. *Salmon v. Nation*, 109 Mass. 216. *Hill v. Bartlett*, 124 Mass. 399. *Dana v. Carr*, 124 Mass. 397.

As the plaintiffs were duly notified of the time and place of the proposed examination of Toomey on his application to take the oath for the relief of poor debtors, and failed to attend, he, being present, was entitled to a discharge, and there has been no breach of his recognizance. The judgment of the Superior Court for the plaintiffs was erroneous, and there must be, according to the terms of the agreed facts,

Judgment for the defendants.

CATHERINE O'DONNELL vs. JACOB BARBEY & another.

Middlesex. Jan. 15. — Sept. 14, 1880. COLT & LORD, JJ., absent.

A., whose only property consisted of an equitable estate for life in land, with a power to appoint in fee by will, made an oral agreement with B. by which he agreed that, if B. would take care of him during his life and bury him, B. should have all his property at his death. A. made a will by which, after directing the payment of his just debts and funeral charges, he devised all his property to B., and appointed him his executor. *Held*, that the charges of administration, the funeral expenses and debts due from the estate were charges upon the land, to be paid before B.'s claim for services rendered in pursuance of the agreement.

BILL IN EQUITY, filed April 9, 1879, by a creditor of the estate of Cyrus Brooks, against Jacob A. Barbey, the executor of the will of Brooks, and Silas Carleton, praying that a certain parcel of land in Cambridge should be declared to be assets of the estate of Brooks, and subject to his debts, and that Carleton, in whom was the record title, should convey the same. The bill was taken for confessed against Carleton. Barbey appeared and filed an answer. The case was heard on the pleadings and the report of a master by *Colt, J.*, who reserved for the consideration of the full court the following case:

On May 3, 1845, Lowell Skelton and Eunice P. Skelton conveyed the land in question to three trustees, of whom the defendant Carleton is the sole survivor, in trust to pay the net rents and profits to Alice Brooks during her life, and after her death to her husband, Cyrus Brooks, if he should survive her, and after the death of both to stand seised of the land for the use of the heirs of Cyrus Brooks, "or to dispose of and convey the said premises in such way and manner as the said Cyrus Brooks may by his last will and testament in writing direct and appoint."

The trustees accepted the trust. Cyrus Brooks survived his wife, received the benefits of the trust during his life, and died on March 18, 1877, leaving a will, executed on February 16, 1875, which was duly admitted to probate, and contained the following clause: "After the payment of my just debts and funeral charges, I bequeath and devise as follows: I give and

bequeath all my property of every name, nature and description, and of which I shall be possessed at the time of my decease, to Jacob Barbey," and particularly mentioning the estate left in trust. The will also appointed Barbey executor. Barbey, on April 10, 1877, was duly appointed executor and gave bond in the usual form, and still is executor. Cyrus Brooks, at the time of his death, was possessed of no property except the power of appointment above mentioned.

The plaintiff, on March 3, 1876, recovered judgment against Cyrus Brooks in the sum of \$706, and costs of suit, which judgment is still in force, and Barbey, as executor, refuses to pay the same. On March 1, 1879, the plaintiff brought an action on this judgment, which action is still pending.

A short time before the will was made, it was agreed between Cyrus Brooks and Jacob Barbey and his wife that, if they would take care of him during his life, and bury him at Lincoln upon his death, they should have all his property; and Brooks made his will in pursuance of this agreement, and for the purpose of carrying out the same on his part. Barbey and his wife fulfilled their part of the agreement, and Barbey's wife took personal care of him during his life, and applied money for his support, furnished by her husband, and on his death they buried him at Lincoln. Brooks, until within six months of his death, lived in the house on the land in question, letting part of it, but grew so feeble that, about six months before he died, he was moved into Barbey's house, and was faithfully cared for and supported there by Barbey and his wife during the remainder of his life. Barbey paid certain amounts for taxes on the house, for repairs, for insurance, for medical attendance in the last sickness of Brooks, for clothing, for funeral expenses, and removing his body to Lincoln, and there were also due him certain other amounts for board and care. These expenses and services were incurred and performed by Barbey, he looking for reimbursement and compensation to the disposition of his property made by Brooks to Barbey in his will, and to the agreement previously made. This agreement was not in writing, but was a fair and meritorious one.

No claim has been made on Barbey for payment of any debt of Brooks, except by the plaintiff. The plaintiff is indebted to

the estate of Brooks in the sum of \$140, due for rent of part of said house from May 6, 1873, to October 20, 1874.

S. H. Dudley, for the plaintiff.

F. W. Kittredge, for the defendant.

SOULE, J. The defendant Barbey and his wife agreed orally with Cyrus Brooks to take care of him during his life, and bury him when dead, in consideration of having all his property after his death. It was understood that Brooks should perform the contract on his part, by making his will in favor of Barbey, as appears from the fact that he so made his will for the purpose of performing the contract, and from the further fact that Barbey made no request for performance in any other way. No other mode of performance so far as regards the land described in the plaintiff's bill was possible, because Brooks had merely an equitable life estate in it, with a power of appointment over the fee by will.

Any property of his own could be disposed of by Brooks by will, only subject to the payment of his debts. Whether he could, in consideration of his contract with Barbey, have made an appointment in his favor which would have been good against his own creditors, it is not necessary to consider. It is settled that a voluntary appointment is not good against creditors. *Clapp v. Ingraham*, 126 Mass. 200.

In making the appointment, Brooks, the testator, saw fit to make the property as to which he executed the power, equitable assets in the hands of his executor. He gave it to Barbey, only after payment of his just debts and funeral charges. In effect, the will is an appointment first in favor of creditors, and secondly in favor of Barbey. Whether this is in strict accord with what Barbey expected when he made the oral agreement, it is not important to inquire. His interest in the property comes only by virtue of the appointment, and, as he claims under that appointment, he cannot claim adversely to it.

The result is that the property described in the bill is assets for the payment of the debts of the testator, and must be applied in the same way in which assets in the hands of an executor are ordinarily applied. The executor is entitled to receive the expenses of administration, because these are the first matter to which assets are applicable; and the funeral expenses

because these are specially provided for in the appointment, and are charges which, in case of a want of assets sufficient to pay debts, are preferred claims against the estate. Gen. Sts. c. 99, § 1. In the funeral expenses is to be included the cost of removing the body to Lincoln, as it was buried there. The plaintiff is entitled to the proceeds of the property described in her bill, after payment of the expenses above named, or so much thereof as is necessary to pay her judgment with interest, after deducting the amount of her debt to the estate, with interest from October 20, 1874, and to her costs.

The trustee must sell the land, and out of the proceeds, after deducting the expenses of the sale, pay to the executor, the defendant Barbey, the amount of the expenses of administration and the funeral charges. He will then pay the amount due to the plaintiff, including his costs to be taxed by the clerk, or such part thereof as the proceeds remaining are equal to; and if there remains any surplus in his hands after paying the plaintiff in full, he will pay the same to the defendant Barbey.

The defendant Barbey is not entitled to receive any part of the proceeds of the land in payment of the expenses of the last sickness of the testator, nor in payment of his charges for taking care of the testator, nor in payment of any expenses incurred by him in repairing the buildings, because it does not appear that these services were rendered or expenses incurred in any expectation that they would be paid for otherwise than by means of the will which the testator made.

Decree accordingly.

OTIS J. TARBELL vs. FRANK J. JEWETT.

Middlesex. January 12, 1877; January 14, 1878. — September 27, 1880.

A., the guardian of a minor, at the time of his death, held the promissory note of B., payable on demand to his order as guardian. B. and C. were appointed executors of A.'s will, but no mention of the note was made in their inventory or accounts. C. was also appointed guardian in place of A., and several payments were subsequently indorsed upon the note, leaving a balance due. C. died and D. was appointed guardian in his stead, and he refused to receive the note as the property of his ward. B. resigned his office as executor, and E. was appointed administrator with the will annexed of the estate of A., brought an action against B. on the note, obtained judgment and levied execution on land which B. had conveyed in fraud of his creditors. *Held*, on a writ of entry by the purchaser at the sale on execution to recover possession of the land, that the note was extinguished as a contract; that the amount due thereon having become assets in the hands of B. as executor of A., no action could be maintained upon it by E.; and that the tenant, not being a party or privy to the action by E., was not concluded by the judgment therein.

WRIT OF ENTRY to recover a parcel of land in Pepperell. Plea, *nul disseisin*. Trial in this court, before Lord, J., who ruled, as requested by the tenant, that he was entitled to a verdict, which was returned accordingly; and the demandant alleged exceptions. The facts appear in the opinion.

The case was argued in January 1877, and reargued in January 1878, by *J. N. Marshall*, (*M. L. Hamblet* with him,) for the demandant; and by *T. H. Sweetser* & *F. A. Worcester*, for the tenant.

ENDICOTT, J. To understand fully the ground upon which we rest the decision of this case, it will be necessary to recite such portion of the facts as we deem material.

Abel Jewett died in January 1854, leaving a will, in which his two sons, Otis P. Jewett and Samuel A. Jewett, were named executors. The will was soon after admitted to probate, and the executors were duly qualified, and proceeded to settle the estate. The will devised to these two sons a certain parcel of real estate, subject to certain uses in favor of the testator's widow during her life, and also to an annuity to her. Otis P. Jewett conveyed his half of this estate to his brother, Samuel A. Jewett, by deeds dated September 2, 1854, and January 19, 1858; and in December 1858 Samuel died, leaving as his sole heir at law Franklin

J. Jewett, the tenant, who has since continued in possession of the whole estate, subject during the life of the widow, who died in 1873, to the uses and annuity named in the will. Otis P. Jewett continued to hold the office of executor until October 27, 1863, when he resigned, and Samuel Parker was appointed administrator of the estate with the will annexed. At the time of the death of Abel Jewett, he was the guardian of the minor children of F. F. Parker, deceased, and held the note of Otis P. Jewett, dated May 1, 1853, and payable on demand to his order, as guardian of these minor children, upon which \$2500 and interest was due. The note was never indorsed. After his death, his son Samuel A. Jewett was appointed guardian of the minors, as successor to his father, and among the effects which came into his hands as belonging to the minors was this note. The note of one executor payable to the testator and due to the estate thus came into the hands of Samuel A. Jewett, who was acting in the double capacity of co-executor under his father's will, and guardian of the minors whose money had been invested in the note. Several payments are indorsed on the note, made between May 1 and November 9, 1854, leaving a considerable balance due thereon. By whom these payments were made, or in what capacity Samuel A. Jewett received them does not appear in terms; but it is to be presumed that they were made by Otis P. Jewett, the maker, who thus acknowledged his liability upon the note; and as the report finds that neither the note, nor any balance due thereon, was inventoried or accounted for by the executors, we may assume that Samuel A. Jewett intended to receive the payments as guardian of his wards. No other payments were made thereon during the lifetime of Samuel A. Jewett. Upon his death in 1858, Henry A. Parker was appointed guardian in his stead, and he refused to receive the note "as the property of his wards, on the ground that the lending of the money for which it was given was an improper investment." He therefore looked to the estate of Abel Jewett, of which Otis P. Jewett, the maker of the note, was the surviving executor, for the payment of the sum due him as guardian; but although Otis P. Jewett continued to act as executor for the ensuing six years, no payment was made to the new guardian. Immediately after the appointment of Samuel Parker as administrator with the

will annexed, in October 1863, he brought an action against Otis P. Jewett to recover the balance due on the note, and judgment was obtained and execution issued thereon in February 1864. Whether Samuel Parker received from Otis P. Jewett any other assets belonging to the estate of Abel Jewett does not appear.

Upon the execution thus obtained, the undivided half of the real estate, conveyed by Otis P. Jewett to his brother Samuel, was duly set off to Parker, as administrator, in March 1864, Parker contending, as the demandant now contends, that the deeds to Samuel A. Jewett were given and received to defeat, delay and defraud the creditors of Otis P. Jewett. No other proceedings appear to have been had until 1874, when, upon a writ of *scire facias* sued out by Parker, the previous levy was set aside, and another execution issued, which was returned in no part satisfied. Thereupon Parker, in his capacity as administrator, brought an action on the judgment, and caused to be attached the undivided half of the real estate before referred to, the record title thereto standing in the name of Samuel A. Jewett, deceased, of whom the tenant was the sole heir at law. Judgment having been entered, and execution having issued, the undivided half, so attached on the writ, was seized and sold by public auction, and duly conveyed to the demandant.

It is to be observed that the demandant's case rests solely on the judgment finally obtained and the levy last made in the suit originally brought by Samuel Parker, administrator, against Otis P. Jewett, upon the note given by him to his father as guardian. The tenant was not a party or privy to that suit, and is not concluded by the judgment; but may show that the note upon which it was founded was not a valid debt, or was paid, or that the administrator with the will annexed could not maintain an action upon it against the maker, who had been executor of the estate. See *Downs v. Fuller*, 2 Met. 135; *Inman v. Mead*, 97 Mass. 310; *Peterson v. Farnum*, 121 Mass. 476.

The tenant, among other defences, contends that the note was not a valid subsisting note in the hands of Samuel Parker, administrator, but had been paid by operation of law, the maker of the note having been the duly qualified and acting executor of the estate; on the familiar principle that, when a creditor appoints his debtor his executor, the law presumes that to have

been done by the executor which it was his duty to do, and that the sum due on the note had become assets of the estate. In other words, that the estate of Abel Jewett was liable to the wards or their guardian for the amount thus invested in the note, and for that amount the executor, Otis P. Jewett, was indebted to the estate. And as no action could have been brought on the note by the original executors, so no action can be brought upon it by the administrator with the will annexed.

The cases are numerous in which this court has recognized and enforced this general doctrine. *Stevens v. Gaylord*, 11 Mass. 256. *Winship v. Bass*, 12 Mass. 198. *Hobart v. Stone*, 10 Pick. 215. *Ipswich Manuf. Co. v. Story*, 5 Met. 310. *Sigourney v. Wetherell*, 6 Met. 553. *Leland v. Felton*, 1 Allen, 531. *Tarbell v. Parker*, 101 Mass. 165. *Chapin v. Waters*, 110 Mass. 195. *Hazelton v. Valentine*, 113 Mass. 472, 481. *Choate v. Arrington*, 116 Mass. 552. See also *Benchley v. Chapin*, 10 Cush. 173. *Mattoon v. Cowing*, 13 Gray, 387. *Commonwealth v. Gould*, 118 Mass. 300.

It is very clear that the new guardian could properly refuse to receive the note as the property of his wards, and was not bound to rely solely on Otis P. Jewett for payment of the debt. He could not properly take it, if Otis P. Jewett was not responsible, or if the security was doubtful; and as Otis P. Jewett had made no payment thereon between November 1854 and 1858, it was the duty of the new guardian to look to the estate of Abel Jewett, of which the maker of the note was then, and continued to be for five years after, the surviving executor, for the payment of the amount due his wards. Even if Samuel A. Jewett, who was both executor and guardian, had in his lifetime elected or attempted to treat this note as the property of his wards, and not as assets of the estate of Abel Jewett, the new guardian was not bound to do so. The note was simply a contract between Abel Jewett and Otis P. Jewett, and the description of Abel Jewett therein as guardian was merely *descriptio personæ*, and did not change the character of the contract, or the relations of the parties thereto. It is true this description disclosed the fact that the guardian had lent the money of his wards to the maker of the note, and if there had been any value in the note, as a security or investment, the new guardian could have availed himself of it; but he was not restricted to that course, and he

could call upon the estate for the whole sum due. See *Burgess v. Keyes*, 108 Mass. 43; *Hicks v. Chapman*, 10 Allen, 463, 465; *Tarbell v. Parker*, 101 Mass. 165.

The note therefore became assets of the estate, from which the liability of the estate to the guardian could properly be met, and it is immaterial that it was not named in the inventory or accounts.

In *Winship v. Bass*, 12 Mass. 198, the executor refused to treat as assets his indebtedness to the estate, on the ground that it was extinguished by his appointment as executor. The court was of opinion that it was not extinguished, but decided not to remove him from his office, because, "as he must be supposed actually to have received, for the purposes of his trust, a debt due from himself, so that he and his sureties will be responsible on their bond for such debt, the interest of the estate may require that such security may be preserved by continuing the executor in office." The executor's bond is intended to secure the estate, not merely in regard to those assets which are named in the inventory or accounts, but for all those sums which are lawful assets in the hands of the executor, but which he has omitted formally to charge himself with, either through accident or design.

The fact that an executor charges himself with his debt in the inventory or account is an important fact; it settles the question that he owes the estate, and the amount of his debt, and, in those cases where the debt has thus been accounted for, great stress has been laid upon the fact. Peculiar importance was given to this fact in *Ipswich Manuf. Co. v. Story*, 5 Met. 310, because from the nature of that debt, being a bond and mortgage of the executor to his testator, the court intimated that it might have been transferred, except that it had become assets, by charging it, and treating it as such. See also *Leland v. Felton*, 1 Allen, 531. But an executor cannot escape his liability, or change the character of it, by failing to charge himself with his own debt; if he could, then by neglecting his duty there would be no remedy for the estate. Nor is charging himself with it the only way in which the fact of his indebtedness may appear or be proved; and if it appears or is proved otherwise, then his liability is established as conclusively as if he had charged himself with the

debt in his inventory, and his sureties become responsible if he fails to account for it. See *Choate v. Arrington*, 116 Mass. 552, and cases cited; *Hooker v. Bancroft*, 4 Pick. 50; *In re Piper's estate*, 15 Penn. St. 533; *Williams v. Morehouse*, 9 Conn. 470; *Duffee v. Buchanan*, 8 Ala. 27.

Nor is it material that one or both of the executors attempted to treat the note, or did treat it, as the property of the wards in the hands of one executor, who was also acting as their guardian. Only on the ground that the note was part of the assets of the estate of Abel Jewett could Samuel Parker, administrator, bring any action thereon. And the demandant in his argument contends that it will be "presumed that the action was rightly brought," and that "the administrator may have brought it for the benefit of Abel Jewett's estate, or to protect it, or for some other party," citing as authority for this *Hicks v. Chapman*, and *Burgess v. Keyes*, *ubi supra*. Otis P. Jewett was not indebted to the wards, or to the new guardian, unless they elected so to hold him, which the new guardian refused to do, by declining to take his note. And it is not, and could not well be, contended, on the record before us, that Otis P. Jewett was not indebted to the estate for the sum thus lent to him, and represented by the sum due on the note at the time he resigned his office; or that he has denied that he was so indebted, or has refused for that reason to account for it as assets of the estate; or has ever resisted payment. The most that can be said is, that he and his co-executor failed or neglected to put it in the inventory, or to account for it, intending to deal with it as the property of the wards, for whom their father had been guardian; and after it became impossible so to treat the note, by the refusal of the new guardian to take it, Otis P. Jewett failed to account for it as executor in any way.

In *Ipswich Manuf. Co. v. Story*, 5 Met. 310, the assignment by an administrator, of a bond and mortgage due from him to his intestate and charged in his inventory, was held to transfer no interest to the assignee, although assigned as a distributive part of the estate to an heir, the bond named having been paid by operation of law, and being assets in the hands of the administrator. And in *Freakley v. Fox*, 9 B. & C. 130, the maker of a promissory note was appointed executor of the payee, and as

executor indorsed the note to a third person; and it was held that the indorsee could not maintain an action upon it against the maker, for the note was discharged and could not be set up as a binding instrument, the debt due upon it from the executor having become assets of the estate.

These cases decide that the acts of the executor or administrator, in dealing with the instruments on which his indebtedness to the estate arise, cannot vary or affect the rule that, as contracts between him and the estate, they are extinguished, and the sums due upon them have become assets of the estate. The acts of these two executors, therefore, did not change the relations of this note to the estate they were settling.

Even if we assume that the amount due on this note cannot be regarded as assets simply because Otis P. Jewett, the maker of the note, was also executor, on the ground that the estate of Abel Jewett was contingently or not absolutely liable, and might not be called upon to pay the note, while the guardian of the minors treated it as the property of his wards, and looked alone to Otis P. Jewett for payment; yet when the new guardian refused to take the note, because an improper and doubtful investment, the estate of Abel Jewett became absolutely liable to the wards for the amount due thereon. And as that amount was due to the estate from Otis P. Jewett, he was bound to account for it as assets. It might be considered in the nature of property received subsequently, and must be accounted for by the executor, although a new inventory need not be returned. *Hooker v. Bancroft*, 4 Pick. 50.

The only exception to the rule here stated, that has come within our notice, is the case of *Kinney v. Ensign*, 18 Pick. 232. The plaintiff was the administrator of an estate to which he was indebted on a note secured by a mortgage; and it was held that, in his representative capacity, he could redeem the mortgage for the use and benefit of the heirs and creditors of his intestate; and that, although there was a constructive payment, it did not necessarily follow that the mortgage was in equity thereby absolutely discharged; for it would be unjust and inequitable to charge the sureties with the amount, and give the whole benefit to the respondent, who had purchased the equity of redemption subject to this very mortgage. But no question of that kind

arises in the case at bar, for here there is no collateral security to protect the sureties, or upon which the devisees or creditors of Abel Jewett could rely, if the sureties were not responsible. In *Ipswich Manuf. Co. v. Story* and in *Tarbell v. Parker*, *ubi supra*, there were mortgages securing the indebtedness of the executor or guardian, but the debts were nevertheless extinguished by operation of law.

As the case stands, therefore, the liability of Otis P. Jewett to the estate being fully established, certainly after the refusal of the guardian to take the note, and he not having accounted for it as assets, there was a breach of the executor's bond, and the sureties were, and are, liable in the same manner as if the executors had failed to account for money received from any other debtor; and this liability did not cease by reason of the resignation of Otis P. Jewett. *Leland v. Felton*, 1 Allen, 531. *Stevens v. Gaylord*, 11 Mass. 256, 270. Where a debtor denies that a debt is due in whole or in part, that question may be tried in a suit on the bond. *Bacon v. Fairman*, 6 Conn. 121, 130.

But it is contended that the note, not having been in fact paid or accounted for, the administrator with the will annexed could properly maintain an action upon it against the retiring executor, Otis P. Jewett. The cases already cited would seem to be a sufficient answer to this claim; for if the assignment or transfer by an executor of the obligations upon which his indebtedness to the estate arise, and which have in fact become assets of the estate, can pass no title to a third person, because they have been paid, it is difficult to see how an administrator with the will annexed, who succeeds such executor, can either transfer those obligations or maintain an action upon them. But the authorities directly on this point seem conclusive, and it may be well to refer to them.

It was decided in *Wankford v. Wankford*, 1 Salk. 299, that where an obligor is made executor to his obligee, and administers some of the goods, but dies before proving the will, the debt is extinguished and becomes assets, and the administrator with the will annexed can have no action upon it. By the law of England, an executor, before probate of the will, could take possession of the testator's goods, receive money and bring actions; yet he could not go on with an action without probate, for

when he came to declare he must produce letters testamentary. So far as the question we are considering is concerned, an executor before probate then stood in the same position, as to his own debt to the estate, as an executor duly appointed under our law. In delivering judgment, Lord Holt said, "When the obligee makes the obligor his executor, though it is a discharge of the action, yet the debt is assets, and the making him executor does not amount to a legacy, but to payment and a release. If H. be bound to J. S. in a bond of £100, and then J. S. makes H. his executor, H. has actually received so much money, and is answerable for it, and if he does not administer so much, it is a *devastavit*." And Mr. Justice Powell said, "A personal action once suspended by the act of the party is gone forever; and although in some cases it may be suspended and revive again, yet never where that suspension is from the act of the party." "Some books say the action is gone, some say the debt is gone, and some say the debt remains; but they will be all reconciled by this, that the debt will be assets." See remarks of Chief Justice Shaw on this point in *Ipswich Manuf. Co. v. Story*, 5 Met. 310, 313. So, among the exceptions to this general rule, a distinction was made between an administrator and an executor; and as the former was appointed, not by the deceased person, but by act of the law, the action against him was suspended, and might be revived upon the appointment of an executor *de bonis non*. See *Nedham's case*, 8 Rep. 135 a, 136 a, and Frazer's note *E*; *Lockier v. Smith*, 1 Keb. 313; *S. C.* Sid. 79. But since the Prov. St. of 1703 (1 & 2 Anne) c. 12, § 1, 1 Prov. Laws (State ed.) 536, substantially reenacted in our statutes, executors and administrators with us stand on the same footing as to their interest in the estate. *Winship v. Bass*, 12 Mass. 198, 203.

In *Bigelow v. Bigelow*, 4 Ohio, 138, an obligor was appointed administrator of the obligee, and placed the amount of the bond in his inventory. A will was afterwards discovered. The plaintiff was appointed executor, and brought an action on the bond against the administrator of the former administrator, namely, the obligor, and it was held that he could not recover, on the ground that a personal action once suspended was always suspended, making no distinction between an executor and an

administrator. The discovery of the will and the appointment of an executor were held to operate only as a repeal of the grant of administration, which did not avoid all mesne acts. And the court say, "Every act of the administrator has the same validity as if he had not been superseded." Numerous authorities may be cited in support of this proposition. See Com. Dig. Adm. B. 5; Toller on Executors, 347; Wentw. Off. Ex'or, 31, (14th ed.) 73; *Cheetham v. Ward*, 1 B. & P. 630; 20 Edw. IV. 17; 21 Edw. IV. 3, b; *North v. Butts*, Dyer, 139 b; *Fryer v. Gildridge*, Hob. 10; *Sturleyn v. Albany*, Cro. Eliz. 150; *Dorchester v. Webb*, Cro. Car. 372; *S. C. W. Jones*, 345.

When the creditor of the testator is made executor, the same rule holds if the executor has assets, which he may retain to pay himself, in which case the debt is gone, and no action can afterwards be maintained upon it. But if there are no assets there is no extinguishment, for, as Lord Holt says, "If the executor has assets of the obligor, it is an extinguishment, because then it is within the rule that the person who is to receive the money is the person who ought to pay it; but if he has no assets, then he is not the person that ought to pay, though he is the person that is to receive it." 1 Salk. 305.

This may be illustrated by two cases. In *Fryer v. Gildridge*, Hob. 10, two persons were bound to a third jointly and severally. The obligee made the wife of one obligor his executrix, and died. She administered, and then her husband made her his executrix and died, leaving assets to pay the debt. Upon her death, the plaintiff Fryer took administration with the will annexed of the obligee, and brought an action against Gildridge, the surviving obligor; and it was held that the action could not be maintained, because, when the deceased obligor made the executrix of the obligee his executrix, and left assets, the debt was satisfied presently by way of retainer, and no action could be had for that debt.

On the other hand, a case arose in Ohio, where it was held, in a very able and instructive opinion, that the right of action did revive, there being no assets. A creditor was appointed administrator of his debtor, with another person, and administered, but received no assets which he could retain for the payment of his debt, and died. It was held that his administrator

could maintain an action against the surviving administrator, because his intestate received no assets, and it could not be assumed that the debt was paid or extinguished. *Hall v. Pratt*, 5 Ohio, 72. So in *Lowe v. Peskett*, 16 C. B. 500, a testator appointed as one of his executors a creditor who held his note; this executor, being payee of the note, indorsed it to a third party, who brought an action upon it against the executors; and the action was maintained, because the note had not been satisfied out of the estate by the payee, who had received no assets.

We are not aware of any case where it has been held that a debt due from an executor, having once become assets, can be revived, and an action maintained upon it by an administrator with the will annexed; nor of any case where a debt due to the executor has been held not to be extinguished, if sufficient assets come to his hands.

In *Ipswich Manuf. Co. v. Story*, 5 Met. 314, Chief Justice Shaw says: "In the case of *Winship v. Bass*, it is intimated that a determination of the executor to resist payment of such debt, until compelled by a judgment of court, may, in some cases, be deemed a sufficient cause for removing such executor. This certainly implies that, upon his removal, and the appointment of an administrator *de bonis non*, an action for his debt, due to the estate, may be brought. But it also intimates the case in which such proceedings may take place. It is when the executor denies his debt and resists payment; that is, refuses to account for it as assets." As an action may be brought on the executor's bond if he refuses to account for his debt as money received, and as the court decided for that reason not to remove the executor in *Winship v. Bass*, it does not appear to be necessarily implied that the administrator can bring an action, or that it is the only remedy. In *Winship v. Bass*, the denial was on the ground that making him executor was a gift of the debt, and he was not bound to account for it in any form. But however that may be, the case at bar does not come within the narrow limits within which it is said such an action would be confined. It does not appear that Otis P. Jewett denied his debt, or resisted payment, or refused to account for it, because he was not liable. On the contrary, he acknowledged it by

making payments upon it, neglected to charge himself with it in the inventory or accounts, and when the action was brought upon it apparently suffered default.

The case of *Leland v. Felton*, 1 Allen, 531, has a bearing on this question. The controversy there was whether the appellee could be charged for his debts to the estate in an account, rendered after he had resigned his trust as executor, and an administrator with the will annexed had been appointed. The Probate Court had decided that he could not, from which decree the administrator with the will annexed had appealed. But it was held that he could be so charged, which of course rendered his sureties liable. It was contended at the argument, that the debt of the executor was not extinguished by the acceptance of the trust, but that the remedy only was suspended; and that the respondent having resigned, and an administrator having been appointed, the remedy to collect the debt revived, and the reason for treating it as assets ceased. This point is not considered in terms by Mr. Justice Dewey in delivering the judgment, but the conclusion which he reaches is utterly destructive of the position taken by the appellee. He states in substance that the law gives the right to those interested in the estate to treat as assets, received by the executor, the amount of his acknowledged debts to the testator, and so the administrator could properly demand that the executor should be charged in his account rendered after his resignation; but he nowhere intimates that the remedy revives after the resignation, or that the administrator has a choice of remedies, and can elect either to have the executor thus charged, and so hold the sureties, or to bring an action on the debt against him at his option. Indeed, the only ground upon which the executor could be charged is, that there was no outstanding debt or contract, but only assets for which he must account; and this precludes the idea that any action could be maintained by the administrator.

We are therefore of opinion that the note was extinguished as a contract, and the amount due thereon, having become assets in the hands of Otis P. Jewett, the executor, no action could be maintained upon it by the administrator with the will annexed.

Exceptions overruled.

SILAS A. PELL & another vs. SOLOMON F. WEBQUISH.

Barnstable. Jan. 30. — Sept. 11, 1880. MORTON & SOULE, JJ., absent.

The deed of an Indian proprietor of land in the district of Marshpee, made after the passage of the St. of 1834, c. 166, to a person not a proprietor, is void, and is not made valid by the admission of the grantee to proprietorship by the St. of 1842, c. 72, nor by the removal of all disabilities from Indians by the St. of 1869, c. 463; and the heirs of the grantor are not estopped, in a writ of entry, to set up title in the land against such deed.

An authenticated copy of a return, purporting to be an enumeration by the overseers of the proprietors of Marshpee, made nearly fifty years ago, under the St. of 1818, c. 105, which is taken from the files of the Governor and Council, is admissible in evidence in a writ of entry, to prove that a person, under whom the tenant claims, and whose name does not appear on the return, was not a proprietor at the time the return was made, although the return is signed by one only of the three overseers.

WRIT OF ENTRY to recover a parcel of land in Mashpee.
Plea, *nul disseisin*.

At the trial in the Superior Court, before *Brigham, C. J.*, both parties claimed title to the demanded premises under one Mercy McGregory, who was a proprietor of Marshpee.

The demandant Pells claimed by descent from her, and the other demandant claimed by deed from her other descendants to one Chaplin, dated December 24, 1873, and by deed from Chaplin to him, dated September 27, 1877. Both deeds were duly delivered on the premises, and recorded before the bringing of this action.

The tenant claimed under a deed made on July 23, 1834, by Mercy McGregory to his father, Jesse Webquish, and by sundry mesne conveyances from the administrator of the latter under license from the Probate Court, all which had been duly recorded.

By the St. of 1834, c. 166, which was in force when the deed to Jesse was made, no proprietor of Marshpee could convey land to any person other than a proprietor of Marshpee (now the town of Mashpee), and no person not a proprietor could hold land there; and the demandants contended that, when the deed to Jesse was made, he was not a proprietor, and that McGregory was therefore incapable of conveying to him, and he was incapable

of holding land in Marshpee. Upon an issue framed, the jury found that he was not then a proprietor.

By the St. of 1842, *c.* 72, persons having certain qualifications could be admitted as proprietors. It appeared that Jesse Webquish was so admitted in 1842; and that he afterwards exercised the rights of a proprietor, but that he had never exercised those rights or claimed the right to do so prior to his admission, although he was of Indian descent, born either in the county of Barnstable or Plymouth, and had then lived in Marshpee upwards of twenty years.

Jesse Webquish had possession of the demanded premises after the date of the deed to him, but the land always was and now is wild and uncultivated land; and the tenant did not claim title by prescription. There was no evidence that any heirs of Mercy McGrego had ever been in possession of the premises since her deed to Webquish, until the entry was made to deliver the deeds to and from Chaplin.

The tenant contended that, if the deed of Mercy McGrego to Webquish did not operate to convey the title to him at the date thereof, it did so operate when he was admitted to proprietorship in 1842, or when disabilities were removed by the St. of 1869, *c.* 463, and that the heirs of Mercy McGrego were estopped from setting up title against the same; and asked the judge so to rule. But the judge declined so to rule; and the tenant excepted.

By the St. of 1818, *c.* 105, § 1, a record was to be made by the overseers of the proprietors of Marshpee, and a return thereof made, annually, to the Governor and Council; and the demandants offered in evidence a duly authenticated copy from the files of the Governor and Council, purporting to be an enumeration of the proprietors of the plantation of Marshpee, taken in November 1882 by the overseers, and signed by one overseer, in which the name of Jesse Webquish did not appear. The tenant objected to the admission of this paper, on the ground that it did not appear to be the act of the overseers, but of only one of them, there being three, and because the absence of the name of Jesse Webquish therefrom was not competent evidence to show that he was not then a proprietor. The judge admitted it; and the tenant excepted.

After the finding of the jury that Jesse Webquish was not a proprietor, as above stated, the judge directed a verdict for the demandants; and the tenant alleged exceptions.

G. Marston, for the tenant.

T. H. Tyndale, for the demandants.

ENDICOTT, J. Before the passage of the St. of 1869, c. 463, which declared all Indians within the Commonwealth to be citizens, they were treated as wards of the Commonwealth, and the title to lands occupied by them was in the Commonwealth, and their use and improvement were regulated from time to time by the Legislature. *Danzell v. Webquish*, 108 Mass. 183. *Coombs, petitioner*, 127 Mass. 278. See also St. 1870, c. 293.

The St. of 1818, c. 105, in relation to the Indians and other persons, proprietors and residents on the plantations of Marshpee and Herring Pond, defined what persons should be considered proprietors; and also enacted that the real estate held by them, as such proprietors, might be disposed of by deed or will. §§ 1, 5. By the St. of 1834, c. 166, § 9, establishing the district of Marshpee, it was provided that, upon the death of any proprietor without descendants, all his interest in the lands of the district should escheat to the proprietary, and that any proprietor of land in severalty might devise or sell the same to any other proprietor. The power of a proprietor, in conveying land held in severalty, was thus limited, and he had no authority to convey to a person who was not a proprietor. And by § 12 the land of such proprietor was exempt from being taken on execution, and if arrested he might have the benefit of the oath of a poor debtor, notwithstanding any interest he might have in such land. It is obvious that it was the intent of the Legislature, by the enactment of this and similar statutes, to protect the Indians from the dangers arising from their improvidence and incapacity. See *Thaxter v. Grinnell*, 2 Met. 13; *Mayhew v. Gay Head*, 13 Allen, 129.

The deed, therefore, of Mercy McGrego to Jesse Webquish, who was not a proprietor, made after the passage of the St. of 1834, was in contravention of law and void. She was incapable of making such a contract, and its execution could not affect her interest in the estate, or the interest of her descendants, who, by virtue of their descent from her, became proprietors, as provided

in the St. of 1818, c. 105, § 1. Nor did the deed take effect and operate as a conveyance, when Jesse Webquish was admitted as a proprietor in 1842, under the St. of 1842, c. 72, which provided that persons having certain qualifications could be admitted as proprietors. The deed being absolutely void, and the title remaining in Mercy McGrego, neither she nor her descendants were estopped from setting up title in the land, as against Jesse Webquish, although he afterwards became a proprietor; for the doctrine of estoppel has no application to the case of a party incapable by law of making a contract. For the same reason, the St. of 1869, c. 463, removing all disabilities from Indians, cannot affect this conveyance. *Lowell v. Daniels*, 2 Gray, 161. *McGregor v. Wait*, 10 Gray, 72. *Merriam v. Boston, Clinton & Fitchburg Railroad*, 117 Mass. 241. *Pierce v. Chace*, 108 Mass. 254.

It was in evidence at the trial that Jesse Webquish after his admission exercised the rights of a proprietor, but before that time he had never exercised or claimed to exercise such rights.

The St. of 1818, c. 105, § 1, also provided that the overseers of Marshpee, who were three in number, should make an enumeration or census of the proprietors of Marshpee and all other persons resident therein, distinguishing proprietors from other persons, and make a record of the same, which should be revised and corrected at their annual meeting; and further, that "a return thereof shall be made by the said overseers to the Governor and Council on or before the last day of December annually."

The demandants, for the purpose of showing that Jesse Webquish was not a proprietor in 1832, offered in evidence an authenticated copy, from the files of the Governor and Council, of a return, purporting to be an enumeration of the proprietors of the plantation of Marshpee, taken in November 1832 by the overseers, and signed by one overseer.

The tenant objected to its admission, "on the ground that it did not appear to be the act of the overseers, but of only one of them, there being three, and because the absence of the name of Jesse Webquish therefrom was not competent evidence to show that he was not then a proprietor." There can be no

question that it was competent to show by a proper return of the overseers that he was not then a proprietor. The overseers were public officers, charged with the duty of determining who were the proprietors in 1832, and of entering the names in their records; and a return of the same to the Governor and Council was required to be made, in order that the Governor and Council could ascertain and have upon their files the names of those who appeared on the records of the overseers to be proprietors. A return thus made is a public record, and is conclusive upon the question who were at that time the proprietors, and the omission of the name of Jesse Webquish shows that he was not then a proprietor. *Gurney v. Howe*, 9 Gray, 404. *Richardson v. Mellish*, 2 Bing. 229. *Regina v. Pembridge*, Car. & M. 157. 1 Greenl. Ev. §§ 483, 484.

Nor do we consider the return incompetent because signed by one overseer. The return is a ministerial act, intended merely to disclose who are the proprietors, as shown by the recorded enumeration of the overseers. The form in which it shall be made is not prescribed by the statute, and there is no express provision that it must be signed by any or all of the overseers. The requirement simply is that the overseers shall make a return. They could undoubtedly do so by authorizing one to sign for them, or they could return a copy of their record. And if such copy was not duly authenticated, yet if found on the files of the Governor and Council, and nothing appeared to impeach its verity, it would be competent evidence, as a record found in the proper custody, after a lapse of nearly fifty years, when its verification would be difficult, if not impossible. *Rust v. Boston Mill Corporation*, 6 Pick. 158. *Edson v. Munsell*, 10 Allen, 557. *Commonwealth v. Parker*, 2 Pick. 549, 562. This return purports to come from the overseers, and from the fact that it was duly filed we must presume that it was made as the return of the overseers, and was accepted by the Governor and Council as the return required of them by law. See *Rea v. Catesby*, 2 B. & C. 814.

Exceptions overruled.

COMMONWEALTH vs. LEWIS J. GRAY.

Suffolk. March 24. — September 6, 1880.

At the trial of an indictment for adultery, evidence of the reputation for chastity of the woman with whom the defendant is alleged to have committed adultery is competent.

INDICTMENT for adultery with Elizabeth Kirwan.

At the trial in the Superior Court, before *Bacon, J.*, the government offered evidence tending to show that the defendant and Elizabeth Kirwan occupied a room in a lodging-house in Boston as husband and wife, for a period of about four weeks.

The defendant offered evidence to show that the general character of Elizabeth Kirwan for chastity was good. The government objected to the evidence; and the judge excluded it.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

G. W. Searle & J. H. Cotton, for the defendant.

G. Marston, Attorney General, for the Commonwealth.

LORD, J. Evidence which tends directly to prove or disprove the issue which the pleadings in any case present is always competent. It may have more or less weight, but it is the right of the party offering it to have it considered by the jury. It rarely, however, happens, in the trial of a cause, that such evidence only is offered. This is especially true in every case in which the party having the burden of proof attempts to sustain it wholly by circumstantial evidence. In such case, every circumstance which is admitted in evidence becomes material, and may be controverted. Nor is the materiality of facts, not bearing directly upon the issue, confined to circumstances introduced upon issues to be sustained wholly by circumstantial evidence. It rarely happens, and in a contested case perhaps never happens, that some fact, in its character unimportant, and having no bearing upon the issue on trial, does not become material, so that evidence in relation to it cannot be rejected. The more common illustrations of this are perhaps time, place, or both time and place. In addition to these, collateral questions often arise which make facts material which otherwise are wholly unimportant. In criminal cases especially, the question of motive

or provocation may become material, and be the subject of testimony. While, in a criminal case, the identity of the party charged with the one on trial is always material, yet other questions of identity may constantly arise, upon which testimony becomes material and competent, which otherwise would be wholly unimportant. Questions of character or reputation may often become material, and such questions may relate to a building, or a locality, as well as to an individual. It is sometimes said, but not with entire accuracy, that it rests with the presiding judge in his discretion to admit or reject evidence, as he shall judge it to be or not to be too remote. It often happens that the competency of evidence may depend upon the existence of some other fact; whether such fact exists is a preliminary question, to be decided by the presiding judge. His decision as to such fact cannot be revised; but his ruling as matter of law that such fact renders the evidence competent or incompetent is the subject of revision; and upon examination, in all those cases in which the admission of the evidence is said to rest in the discretion of the presiding judge, we think it will be found that it is the decision of a preliminary fact upon which the finding of the judge is conclusive, and which fact determines the competency of the evidence. See *Foster v. Mackay*, 7 Met. 531; *Commonwealth v. Mullins*, 2 Allen, 295; *Kendall v. May*, 10 Allen, 59; *Commonwealth v. Morrell*, 99 Mass. 542; *O'Connor v. Hallinan*, 103 Mass. 547.

In this case, the precise question presented by the exception under consideration is, whether evidence of the character or reputation for chastity of the person with whom the adultery of the defendant is alleged to have been committed is admissible. It is quite true that legally her character or reputation is not in issue. No judgment upon this indictment can affect either her or her reputation; and in no proceeding against her would a judgment upon this indictment be admissible in evidence. Still, her character or reputation may be a material fact, and so evidence upon it be competent and material. There can be no doubt that, upon an indictment for adultery, the defendant may be convicted upon evidence wholly circumstantial; and, from the nature of the offence, it commonly happens that the act is finally inferred from circumstances, which circumstances may

have in themselves very direct or only indirect bearing upon the issue.

Suppose, in a case depending upon circumstantial testimony, the government should offer evidence that the defendant, a married man, was seen at a late hour of the night to accompany a common prostitute to a house of ill fame, and was seen to leave that house early the next morning, it is quite apparent that not only the time, both at night and at morning, but the reputation both of the woman and the house, would be important and material, and evidence would be admissible upon each one of them; but neither of them is a fact which the judgment upon the indictment could in any mode affect, or in relation to which the judgment would be evidence. And so in relation to the character of the person with whom the adultery is alleged to have been committed; the judgment could indeed have no effect upon her, but her character is so connected with and so contributing to her identity that it becomes as really one of the necessary surrounding circumstances as any fact in the case. At any time, upon a charge of adultery, the government, after showing the defendant's presence under suspicious circumstances with a woman, may show that that woman is a prostitute; and it would seem to be reversing the humane maxim of the law to permit the government to prove as an independent fact the bad character of a woman in support of an issue, and to deny to the defendant the right to introduce evidence upon the same subject upon the same issue. It has long been held that, upon a charge against a defendant of rape, the want of chastity of the person alleged to be ravished is competent; *Commonwealth v. Kendall*, 113 Mass. 210; and yet a judgment upon such indictment has no bearing upon the character of the person assaulted, and an acquittal of the defendant upon the single and precise ground that the party alleged to be ravished consented to the act, and a judgment founded upon it, could never be given in evidence against her.

We are not dealing, and we have no right to deal, with the weight of the evidence, unless we can see that no possible harm could come to the defendant by its rejection. The evidence is not reported for our consideration of this question. It is, indeed, true that the excepting party must show that he has

suffered or been prejudiced by the ruling of the presiding judge. He shows this *prima facie*, when he shows that the presiding judge has refused to admit evidence which is competent upon the issue on trial. It then becomes the duty of the other party to show that the rejection of the evidence could not possibly have injured him; and perhaps, if we assumed that all the evidence was reported for the purpose of enabling us to determine such question, we might be satisfied that the evidence ought not to have had any weight, if admitted, and so its rejection could have done the defendant no harm. It is easy to imagine such a case. A man is charged with adultery. It is proved that he has a wife alive in a foreign country, and, in entire ignorance of this fact, the party with whom the adultery is charged innocently and in good faith marries and cohabits with him. In such case, the more spotless the character of the woman, the greater, morally, is his guilt; and it would be easy to see that the rejection of evidence of her good character could not prejudice the defendant upon that state of facts. But in the case at bar we have not all the facts of the case, nor were the facts as before us reported with a view of testing the weight, but only the competency, of the evidence.

Exceptions sustained.



COMMONWEALTH vs. PAULINA WUNSCH.

Franklin. Sept. 21. — 22, 1880. COLT & MORTON, JJ., absent.

No exception lies to the admission of evidence which is competent for any purpose, if the excepting party does not ask for an instruction limiting its effect.

INDICTMENT charging that the defendant, on October 25, 1878, at Greenfield, "unlawfully did use a certain instrument, a particular description of which instrument is to the jurors aforesaid unknown, by then and there forcing and thrusting into the body and womb of a certain woman, whose name is Josie Maguire, the said instrument, with intent thereby then and there to cause and procure the miscarriage of the said Josie Maguire."

Trial in the Superior Court, before *Allen, J.*, who allowed a bill of exceptions, which, after stating that the indictment was made a part of it, proceeded as follows :

"Josie Maguire, the person named in the indictment, was called as a witness. The government offered her evidence of conversations with and acts of the defendant at the defendant's house in Greenfield. The defendant objected to this evidence. In reply to a question by the court, the district attorney stated that the government relied on this evidence only to show the intent which accompanied the subsequent act of the defendant at Gill, the latter being the alleged criminal act. The court, for that purpose, admitted the evidence, and the defendant excepted; thereupon Josie Maguire testified in substance as follows : 'I first saw the defendant at her house in Greenfield, in October 1878. I called there again about a week after: the second time I was there was the 18th of October. I told the defendant I was in trouble and wanted she should help me. I did not tell her I was pregnant. I was not certain of the fact. A female friend who was with me suggested it to the defendant. I asked her if she could not give me something. She gave me some medicine to take. At the second visit to her house, the defendant performed an operation upon me. She used an instrument. I saw it: it looked like steel and had a hook on it. I was on the bed in the bedroom. At each visit the pay was talked about. I paid her \$15 at my second visit, the balance was to be paid in a few months. The whole amount to be paid was \$50. The defendant agreed to call and see me at Gill.'

"The said Josie Maguire further testified that, a day or two after her second visit to the defendant's house in Greenfield, the defendant came to the house where she was stopping in Gill, and that she and the defendant were alone together in her bedroom some two or three hours, and that while there the defendant repeated the operation which had been performed upon her a few days before at Greenfield; that she saw a number of instruments. The witness gave a general description of some of them. The witness stated that, a few days after, she was taken sick. The above is not all the evidence of Josie Maguire, or all the evidence there was in the case."

The jury returned a verdict of guilty; and the defendant alleged exceptions.

A. De Wolf, for the defendant. The evidence offered by the government was competent for a certain purpose, and incompetent for other purposes. In the many cases in which such evidence has been admitted, careful instructions have been given to guard against its improper use. In the case at bar, it does not appear that the jury were instructed as to the proper or improper use of the evidence. The indictment charged the defendant with committing the crime at Greenfield, not Gill. The objectionable evidence related to what took place in Greenfield. The court should have instructed the jury fully on this point. Had such instructions been given, the exceptions would have so stated. It is not enough to say that proper instructions would have been given had the defendant requested them. The prejudice to the defendant is the same, whether the omission was accidental or intentional. *Goddard v. Perkins*, 9 Gray, 411. *Keener v. State*, 18 Ga. 194.

G. Marston, Attorney General, for the Commonwealth.

BY THE COURT. The defendant's counsel admitting that the evidence was competent for some purposes, and not having asked at the trial for any instructions limiting its effect, no ground of exception is shown.

Exceptions overruled

COMMONWEALTH vs. DANIEL W. HAMILTON & another.

Franklin. Sept. 21. — Oct. 22, 1880. COLT & MORTON, JJ., absent.

Neither the judgment of a magistrate, upon a complaint of which he has concurrent jurisdiction with the Superior Court, that the defendant be discharged for want of probable cause to believe him guilty, nor his judgment that there is probable cause to believe the defendant guilty, and that he recognize for his appearance in the Superior Court, can be pleaded in bar to a subsequent indictment for the same offence.

INDICTMENT, found at March term 1880 of the Superior Court, alleging in the first count that the defendants, on February 10, 1880, at Greenfield, tortured a horse by pulling off its

tongue; and, in the second count, that the defendants, on the same day and at the same place, cruelly mutilated a horse by pulling off its tongue.

Hamilton pleaded in bar of the indictment a former acquittal upon a complaint to a trial justice charging him alone with the same offence. The plea referred to a copy of the record of the trial justice, which set forth the complaint, and the order of the magistrate that the defendant be discharged for want of probable cause to believe him guilty.

Both defendants also pleaded in bar of the indictment a former conviction, upon a complaint to a trial justice charging them with the same offence set forth in the indictment. The plea referred to a copy of the record of the trial justice, which set forth the complaint and the finding of the magistrate thereon that there was probable cause to believe the defendants guilty, and an order that they recognize with sureties for their appearance before the Superior Court at March term 1880.

The district attorney filed a replication to each plea, denying in one that the defendant Hamilton had been acquitted of the offence charged in the indictment, and in the other that the defendants had been convicted of the offence set forth in the indictment; and alleging in both that the trial justice only heard and examined into the matter charged in each complaint, for the purpose of holding the accused to bail to await the action of the grand jury.

To these replications demurrers were filed, which were overruled by the Superior Court; and the defendants appealed to this court.

C. C. Conant & S. D. Conant, for the defendant.

G. Marston, Attorney General, for the Commonwealth.

SOULE, J. The demurrers were properly overruled. The offences charged in the complaints were within the jurisdiction of the trial justice, but his jurisdiction was concurrent with that of the Superior Court. It was within his province, therefore, either to try the defendants who were brought before him on the complaints, or to examine them merely with reference to ordering them to recognize for their appearance before the Superior Court. *Commonwealth v. Harris*, 8 Gray, 470. *Commonwealth v. Boyle*, 14 Gray, 3.

It is clear, from an inspection of the record of the proceedings before the trial justice, that he took jurisdiction in each case only for the purpose of making a preliminary examination, to determine whether to order Hamilton in the first case, and both defendants in the second case, to recognize for appearance at the Superior Court. Any conclusion arrived at on such an examination is not conclusive as to the guilt or innocence of a party charged, and is not a bar to a subsequent indictment for the same offence.

Judgment affirmed.

COMMONWEALTH vs. ELIJAH M. BALDWIN.

Hampden. Sept. 28. — Oct. 21, 1880. COLT & MORTON, JJ., absent.

An indictment for abortion alleged that the act was committed on the 7th of a certain month. The principal witness for the government testified that the act was committed on the day alleged, and that the woman died on the next day; and gave a circumstantial account of all that took place between the commission of the act and the death. Several witnesses, including the medical attendant, testified that the death occurred on the 9th of the month. The defendant put in evidence tending to prove that he was out of the State during the whole of the 7th. *Held*, that the attorney for the government was properly allowed to argue to the jury that the act was committed on a day other than the 7th.

INDICTMENT alleging that the defendant, on July 7, 1879, at Springfield, unlawfully used a certain instrument in and upon the body of Emma M. Weller, with intent to procure a miscarriage, and thereby caused the death of said Weller. At the trial in the Superior Court, before *Gardner, J.*, the jury returned a verdict of guilty; and the defendant alleged exceptions, the substance of which appears in the opinion.

G. M. Stearns & H. M. Coney, (E. H. Lathrop with them,) for the defendant.

F. H. Gillett, Assistant Attorney General, for the Commonwealth.

LORD, J. It is not contended in this case that, during the course of the trial, evidence was either improperly received or improperly excluded, or that any rule of law in relation to the crime itself, or the mode of proof, was erroneously adopted. But

the defendant contends that there was a mistrial, because the district attorney, after all the evidence was in, was allowed to argue to the jury that the day on which the offence was committed was a different day of the month from that alleged in the indictment, and testified to by the principal witness.

The indictment alleges the offence to have been committed on the 7th day of the month. The witness testified that the act was committed on the 7th day of the month. It is contended that the defendant had established an alibi by proof that he was out of the State during the whole of the 7th. If there were nothing else in the case upon the question of time, it would be a very harsh rule of law to hold that counsel, in argument to the jury, could not suggest the mistake in a date by a witness, in order to explain apparent inconsistencies in the evidence. But it is by no means all; and when the whole evidence upon the question of time is taken into consideration, it is certain that the witness was designedly or unintentionally wrong either as to the day or as to the fact. He testified that the offence was committed upon the 7th, and that the victim died on the 8th; and gave a circumstantial account of all that took place between the commission of the offence and the death, covering a period of about twenty-four hours. Several witnesses, including the medical attendant, testified that the death occurred upon the 9th day. There was evidence also that the defendant himself was sent for during the last moments of the victim's life, and that he did not arrive at the house till after the death; and he, being a witness, testified that it was upon the 9th that he was called, and went to the house, and found her dead.

In this state of the evidence, it is apparent that it was the duty of the government officer to contend that the offence was committed upon the 8th, not necessarily to avoid the alibi which the defendant had set up, but in order to reconcile the apparent conflict in the evidence offered by the government. The defendant had no right to contend that the government was bound by the time stated by the witness, and estopped to contend that it was on any other day; and time is never necessarily to be proved as laid, except where it is an element of the offence. Nor is it a hardship to the defendant. It may be that he does not derive the benefit from the mistake which he had hoped. It

was within his power, and it was his duty, to ask for delay, if he was surprised, and to meet the new aspect of the case, if it was new to him; and the presiding judge, in his discretion, would have prevented any prejudice to the defendant. But the defendant asked no delay, but, instead of that, asked a strictly technical ruling, based upon a mistake in fact and involving a rule of law which it would have been erroneous to give. The ruling which he asked the court to give was, that "the government having proved by the witness, Weller, that the offence was committed on July 7th, and rested upon that, it was bound by his (Weller's) statement, and the district attorney cannot, in his argument, discredit his witness, and argue that the offence was committed on a different day, to avoid the alibi."

The testimony of a witness to a fact does not prove the fact, and it does not appear to be true, as matter of fact, that the government rested upon such proof; for by the bill of exceptions it appears that the government proceeded with its case, and established the fact, as it contended, that the death occurred on the 9th, instead of on the 8th, as the witness had testified. It further appears, from the bill of exceptions, that the attention of the jury was especially called by the court to this discrepancy in the evidence; and the jury's attention was called to the fact that the principal witness, if honest, must be mistaken either as to the time of the operation or the interval between that and the death of his wife, if the other evidence in the case were believed. A portion of the instructions on this subject is given in the bill of exceptions, and it appears from the instructions given that the attention of the jury was particularly called to this error as it bore upon the matter of the alibi. The language of the bill of exceptions is, (after stating the portion of instructions given,) "The court then went on to instruct the jury how this question affected the alibi." These instructions must be deemed sufficiently favorable to the defendant. He did not state them, nor did he ask any different instructions from those given, nor any change or modification.

Nothing appears to show a mistrial; but, on the other hand, the rights of the defendant appear to have been carefully guarded, and the attention of the jury carefully directed to the precise point upon which the defendant relied. It is not one of the

rights of the defendant to be acquitted of a crime solely upon the ground that a witness for the government has made a mistake in stating the day of the month.

The defendant's counsel, in their argument, contend that the Commonwealth is estopped to deny that the offence was committed on the 7th, for the reason that it is alleged in the indictment and the principal witness testified that it was on the 7th. This is a novel application of the doctrine of estoppel. An elementary rule of pleading is that a time certain must be named for the commission of the offence charged, but, except where the time is an element of the offence, it need not be proved as laid.

The other branch of the proposition, that the government is bound by estoppel to the statement of a witness as to time, would be still more difficult to maintain. Time is determined not abstractly, but artificially and by events. The day before the death of the witness's wife, and more especially if the death is caused in the manner charged in this indictment, is a time certain. It may have been upon one day of the month, or upon another; but its relation to the act of the defendant, if such act were committed by him, is much more likely to impress the memory than its relation to any day in the calendar. By which time is the government to be estopped?

It is said by the defendant's counsel that the district attorney did not state until his closing argument that he should contend that the offence was committed on the 8th. It would be doing great injustice to the ability and acuteness of the defendant's counsel to suppose that it was not entirely apparent to them that such would necessarily be the line of argument. There is no rule of law which requires the closing counsel to give notice to the opposing counsel of what his line of argument is to be; and it has already been intimated that courts will carefully guard the rights of parties against surprise. *Exceptions overruled.*

COMMONWEALTH vs. JAMES F. MATTHEWS.

Worcester. October 5. — 22, 1880. COLT & MORTON, JJ., absent.

If a witness testifies to a fact, which it appears, on cross-examination, he does not know of his own knowledge, his testimony is incompetent, and the witness cannot be contradicted by evidence that he has incorrectly stated his information.

An order of the selectmen of a town to an officer, directing him to cause all saloons to be closed at a certain hour, and containing an intimation of an intent to prosecute offenders against the law in certain contingencies, is not a license to sell intoxicating liquors at times and under circumstances not mentioned in the order.

COMPLAINT to the First District Court of Eastern Worcester, under the Gen. Sts. c. 87, § 6, charging the defendant with keeping, from September 1, 1879, to February 9, 1880, at Westborough, a tenement used for the illegal sale and illegal keeping of intoxicating liquor, the same being a common nuisance.

At the trial in the Superior Court, before *Allen, J.*, Louis J. Elwell, a deputy sheriff, testified for the government that he knew the defendant; that he kept a saloon and grocery in Spaulding's block in Westborough during the time named in the complaint; that, on January 31, 1880, the witness was at the place of business of the defendant and found two kegs of beer and twenty-four bottles; that there was a bar, a beer-pump and a sippio-table in a small room just off from the grocery; that the beer was in a cellar connected with the premises; that he took a sample of the beer and sent it to Boston; that it contained three and a half per cent of alcohol; that he found no other liquor except the beer on the premises; and that the beer was a species of lager.

On cross-examination, it appeared that the witness was not an expert in testing or analyzing beer; that his testimony as to the strength of the beer was based entirely upon a telegram from one James F. Babcock of Boston; and that the witness had not analyzed the beer, and had no personal knowledge of its alcoholic strength or percentage.

The defendant asked the witness if the telegram upon which his testimony was based did not say that the beer was not lager,

but somewhat lighter. The judge declined to allow the witness to answer. The defendant then offered in evidence the telegram addressed to and received by the witness, which was as follows : "Boston, March 11, 1880. Received at Westborough, Mass. To L. J. Elwell: Beer from James F. Matthews January 31 contains three and one half alcohol. Not lager somewhat lighter. James F. Babcock." The judge excluded it.

The defendant also offered in evidence the following writing, to show that he had the written authority of the town to sell and keep for sale the beer in question, and that no licenses other than the one contained in the writing were granted by the town during the time covered by the complaint : "Selectmen's Office, Westborough, January 1, 1880. To Louis J. Elwell, deputy sheriff. You are hereby ordered by the board of selectmen to cause the billiard-halls and other saloons to close their respective places of business at or before 10 o'clock P. M., and to suggest to them to conform to the laws regulating such places. The selling of beer or other intoxicating liquors to minors and persons receiving military, state or town aid, or any sale on Sunday, will be considered sufficient cause to proceed against any and all persons so offending under the nuisance act. Per order of Selectmen. Wm. Curtis, Chairman." Upon objection, this evidence was excluded.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

W. A. Gile, for the defendant.

G. Marston, Attorney General, for the Commonwealth.

AMES, J. It was entirely within the ordinary rules of evidence to allow the witness Elwell to testify as to what he found at the defendant's place of business, and to give a general description of the place and of the mode in which it was furnished. He had a right also to testify that the beer which he found there was a species of lager, which was merely another mode of saying that it resembled, or appeared to him to be, lager beer. In saying, however, that it contained three and a half per cent of alcohol, the cross-examination showed that he spoke without actual knowledge, and relied upon information conveyed to him by a telegram from another person. That is to say, his testimony upon that particular point was mere hearsay, and

was therefore incompetent and irrelevant. The fact that the defendant did not object to it does not render the telegram admissible in his favor, or give him the right to contradict hearsay evidence by other evidence of the same character. The presiding judge, in the exercise of his discretion, might rightfully exclude the telegram. *Mowry v. Smith*, 9 Allen, 67. *Commonwealth v. Fitzgerald*, 2 Allen, 297. *Parker v. Dudley*, 118 Mass. 602. It does not contradict the witness's testimony that the beer appeared to him to be lager, as it did not appear that his opinion on that point was based upon or derived from the telegram.

The order of the selectmen to the deputy sheriff, although it was an intimation of an intent to prosecute offenders against the license law, in certain contingencies, had no effect as a license.

Exceptions overruled.



COMMONWEALTH vs. JAMES F. MATTHEWS.

Worcester. October 5. — 22, 1880. COLT & MORTON, JJ., absent

At the trial of a complaint for the unlawful keeping of intoxicating liquor on a certain day, with intent to sell the same unlawfully, there being evidence that the defendant kept a saloon both before and after the date named in the complaint, the government may show, on the question of intent, that the defendant had liquor at his saloon a week or ten days later than that date.

COMPLAINT, under the St. of 1875, c. 99, to the First District Court of Eastern Worcester, charging the defendant, on March 9, 1880, at Westborough, with unlawfully keeping intoxicating liquors, with intent to sell the same unlawfully.

At the trial in the Superior Court, before *Allen, J.*, the government put in the evidence of *L. J. Elwell*, a deputy sheriff, who testified that he seized, on March 8, 1880, a quantity of beer in a cask in the defendant's place of business, which was a grocery and saloon in Westborough, in which place was a beer-pump, bar and other saloon fixtures; and also the testimony of

a chemist, who analyzed the sample of beer seized by Elwell, that the beer contained six per cent of alcohol and was lager beer. J. W. Fairbanks, a witness for the government, testified that the defendant, on May 24, 1880, testified in court that he had some intoxicating liquor at his store some six weeks or two months before, and that he then conveyed the same to his house. This evidence was admitted against the defendant's exception. The district attorney, against the defendant's objection, was then allowed to ask the witness if the defendant at this time said anything about having the liquor in question in connection with the trial of this case before the magistrate, on or about March 15, 1880; to which the witness, against the defendant's objection, answered that the defendant said he had it when he went out of business, which was a week or ten days after the complaint.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

W. A. Gile, for the defendant.

G. Marston, Attorney General, for the Commonwealth.

AMES, J. It appears from the bill of exceptions that there was evidence which tended to show that the defendant's place of business was a grocery and saloon, furnished with a beer-pump, a bar and other saloon fixtures, and that intoxicating liquors were found there on the day before the filing of this complaint. We see no ground on which the defendant could object to proof that on the 24th day of May last, in court, he testified that he had intoxicating liquor at his shop some six weeks or two months before that date, and that he then conveyed it to his house. The prosecuting officer then inquired in substance, "Did he then say anything about having the liquor in question, in connection with the trial before the magistrate who issued the warrant?" which trial was on the 15th day of March last. To this question the witness answered that the defendant testified that he had the liquor when he went out of business, which was a week or ten days after the complaint. To this evidence the defendant excepted. We think, however, that where there is evidence of a continuous business, such as the keeping of a saloon, it is allowable to show the general course of business, such as the fitting up and furnishing of the place, and the

keeping of goods or liquors, apparently for sale, at and about the time charged in the complaint. Upon the question of intent, in such a case, the acts of the defendant soon after, as well as shortly before, the act complained of, may have a bearing. There were circumstances from which the keeping with intent to sell might well be inferred, and the government might prove a continuous keeping, even to a period a week or ten days later than the date charged in the complaint.

Exceptions overruled.

COMMONWEALTH vs. SARO CHIOVARO.

Suffolk. Jan. 27. — Oct. 7, 1880. MORTON & ENDICOTT, JJ., absent.

Under the St. of 1864, c. 250, an objection to an indictment, for a formal defect apparent on the face thereof, which does not affect the jurisdiction of the court, is not open, upon a motion in arrest of judgment, after a plea of guilty.

On an indictment against an accessory before the fact of murder, the omission in the indictment to state the legal effect of the facts particularly set forth against the principal, to define the part of the body on which the mortal wound was inflicted, to allege the place at which the defendant was an accessory before the fact, are all formal objections not affecting the jurisdiction of the court.

INDICTMENT for murder, consisting, besides the usual caption and signatures, of the following allegations :

“ The jurors for the Commonwealth of Massachusetts on their oath present, that Nicolo Infantino, otherwise called Nick, otherwise called the boy, and Antonio Ardito, otherwise called the Greek, on the fourteenth day of August in the year of our Lord one thousand eight hundred and seventy-nine, at Boston aforesaid, in and upon one Joseph F. Frye, feloniously, wilfully and of their malice aforethought did make an assault; and that the said Infantino and the said Antonio a certain pistol, then and there charged with gunpowder and one leaden bullet, then and there feloniously, wilfully and of their malice aforethought did discharge and shoot off to, against and upon the said Frye; and

that the said Infantino and the said Antonio, with the leaden bullet aforesaid out of the pistol aforesaid then and there by the force of the gunpowder aforesaid by the said Infantino and the said Antonio discharged and shot off as aforesaid, then and there feloniously, wilfully and of their malice aforethought did strike, penetrate and wound the said Frye, in and upon the left side of the said Frye, giving to the said Frye then and there, with the leaden bullet aforesaid so as aforesaid discharged and shot out of the pistol aforesaid by the said Infantino and the said Antonio, in and upon the left side of the said Frye, one mortal wound, of which said mortal wound the said Frye then and there instantly died.

“And so the jurors aforesaid, upon their oath aforesaid, do say, that the said Infantino and the said Ardito the said Frye, in manner and form aforesaid, then and there feloniously, wilfully and of their malice aforethought did kill and murder :

“Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

“And the jurors aforesaid for the Commonwealth of Massachusetts, on their oath aforesaid, do further present, that Nicolo Infantino, otherwise called Nick, otherwise called the boy, and Antonio Ardito, otherwise called the Greek, on the fourteenth day of August in the year of our Lord one thousand eight hundred and seventy-nine, at Boston aforesaid, in and upon one Joseph F. Frye, feloniously, wilfully and of their malice aforethought did make an assault; and that the said Infantino and the said Ardito a certain pistol, then and there charged with gunpowder and one leaden bullet, then and there feloniously, wilfully and of their malice aforethought did discharge and shoot off, to, against and upon the said Frye; and that the said Infantino and the said Ardito, with the leaden bullet aforesaid out of the pistol aforesaid then and there by the force of the gunpowder aforesaid by the said Infantino and the said Ardito discharged and shot off as aforesaid, then and there feloniously, wilfully and of their malice aforethought did strike, penetrate and wound the said Frye, in and upon the left side of the said Frye, giving to the said Frye then and there, with the leaden bullet aforesaid so as aforesaid discharged and shot out of the pistol aforesaid by the said Infantino and the said Ardito, in

and upon the left side of the said Frye, one mortal wound, of which said mortal wound the said Frye then and there instantly died.

“And the jurors aforesaid, upon their oath aforesaid, do further present, that Saro Chiovaro, otherwise called Nino Antonio, otherwise called Larry O’Neil, Vincenzo Bandiera, otherwise called Charley Frost, and Giuseppe Donato, otherwise called Joseph Donato, before the said felony and murder was committed in manner and form aforesaid, to wit, on the fourteenth day of August in the year aforesaid, were accessories thereto before the fact, and then and there feloniously, wilfully and of their malice aforethought did counsel, hire and procure the said Infantino and the said Ardito the felony and murder aforesaid, in manner and form aforesaid, to do and commit:

“Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.”

To this indictment the principals pleaded guilty of murder in the second degree. The present defendant pleaded guilty as accessory before the fact of murder in the second degree, and afterwards moved in arrest of judgment “that no offence known to the law is fully and plainly, substantially and formally, set forth and described to him in and by said indictment, as required by law.”

This motion was argued before *Gray*, C. J. and *Endicott*, J., who were of opinion that it should be overruled, but, at the request of the defendant, reserved the questions of law arising thereon for the determination of the full court, and for the entry of such judgment as law and justice might require.

I. S. Morse, for the defendant.

G. Marston, Attorney General, & *F. H. Gillett*, Assistant Attorney General, for the Commonwealth.

LORD, J. The indictment upon which the defendant is held begins with charging against one Infantino and one Ardito the murder of Joseph F. Frye, setting out all the facts and all the legal conclusions necessary to a proper indictment for the crime of murder with technical accuracy and precision. It then recites over again all the facts which are necessary to constitute the crime of murder, and alleges that the acts charged were committed by the two persons before named. It then concludes by

alleging that the present defendant and two other persons named, "before the said felony and murder was committed in manner and form aforesaid, to wit, on the fourteenth day of August in the year aforesaid, were accessories thereto before the fact, and then and there feloniously, wilfully and of their malice aforethought did counsel, hire and procure the said Infantino and the said Ardito the felony and murder aforesaid, in manner and form aforesaid to do and commit: against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided."

If this last allegation (omitting the words "were accessories thereto before the fact and") had immediately followed the charge against the principals, the indictment would have substantially conformed to approved precedents, and would have sustained a conviction both of the principals and of the accessories of the crime of murder. *Sanchar's case*, 9 Rep. 114 a. Stark. Crim. Pl. (2d ed.) 85, 398, 481. *Commonwealth v. Bowen*, 13 Mass. 356; *S. C.* cited 123 Mass. 427, 428. *Commonwealth v. Knapp*, 10 Pick. 477; *S. C.* more fully reported, Knapp's Second Trial (Salem ed. 1880) 8. *Sampson v. Commonwealth*, 5 Watts & Serg. 385. The only embarrassment in this case has been created by the separation of the charge against the accessories from the charge against the principals, and by the unnecessary repetition, by way of preface to the charge against the accessories, of the facts necessary to constitute the crime of murder.

The words with which this repetition is introduced, "And the jurors aforesaid for the Commonwealth of Massachusetts, on their oath aforesaid, do further present," do not necessarily denote a new count. In indictments containing two or more counts, such words are indeed prefixed to each count subsequent to the first. Stark. Crim. Pl. 376. But they are also often used, in indictments containing but one count, merely to begin a new paragraph or sentence, either as introductory to the supplemental charge against an accessory, after fully setting forth the charge against the principal, or for the apparent purpose of interrupting the continuity of narrative, so as to arrest the attention and fix it upon such circumstances as are essential elements of the crime charged. Stark. Crim. Pl. 479, 481, 482,

542, 545-549, 562, 571 *q seq., passim.* 1 Chit. Crim. Law, 176. *Commonwealth v. Glover*, 111 Mass. 395. *Commonwealth v. Cohen*, 120 Mass. 198.

If this indictment should be treated as containing a single count, the unnecessary repetition of the facts and circumstances, as well as the superfluous words "were accessories before the fact," might be rejected as surplusage, leaving the indictment complete in all respects against the accessories as well as the principals. *The King v. Morris*, 1 Leach (4th ed.) 109. *The Queen v. Crespin*, 11 Q. B. 913. *Commonwealth v. Hunt*, 4 Pick. 252. *Commonwealth v. Randall*, 4 Gray, 86. But we have preferred to consider it (as it was treated in the argument for the defendant, and so as to give him the full benefit of his objections) as containing two counts, the one against the principals, and the other against the accessories.

Assuming that the charge against the accessories constitutes a distinct count, then, although in this count every fact which is necessary to constitute the crime of murder is alleged to have been committed by the principals, with all technical precision in form and in substance, yet the legal effect of those facts, which it is necessary to state, and which is ordinarily stated in the language which is used in the previous allegation, "And so the jurors aforesaid, upon their oath aforesaid, do say that the said Infantino and the said Ardito the said Frye, in manner and form aforesaid, then and there feloniously, wilfully and of their malice aforethought did kill and murder," is omitted. *Anon.* Dyer, 304, pl. 56. 2 Hale P. C. 186, 844. Foster's Crown Law, 424. 2 Hawk. c. 25, § 55. 3 Chit. Crim. Law, 787, 751. *Commonwealth v. Davis*, 11 Pick. 432, 438. *Commonwealth v. Sanborn*, 14 Gray, 393, 394. *Commonwealth v. Desmarteau*, 16 Gray, 1, 16. And this second count cannot be held to contain a sufficient charge of manslaughter, because in the case of killing by a single violent act, such as shooting with a pistol, there can be no accessory before the fact to the crime of manslaughter; for if the accessory is present at the killing, he is a principal; and if he is absent and has previously authorized the act, the act of killing is premeditated and is murder. *Goff v. Byby*, Cro. Eliz. 540; *S. C. nom. Bibithe's case*, 4 Rep. 43 b; *S. C. nom. Goose's case*, Moore, 461. 1 Hale P. C. 450, 457, 616. 1 Hawk. c. 30, § 2.

2 Hawk. c. 29, §§ 7, 24. 1 East P. C. 218. *Regina v. Gaylor*
7 Cox C. C. 253; *S. C. Dearsly & Bell*, 288.

The case of *Regina v. Gaylor* is a peculiar one, and it is interesting, not as it bears upon any question involved in this discussion, nor for the principles of law which were or might be supposed to be settled by it; for the court took time for advisement, and subsequently, as the report says, "affirmed the conviction, but without giving their reasons for so doing." But it is interesting rather by reason of the discussion between the judges and the counsel during the argument. Gaylor's wife had produced her own death by voluntarily taking a drug for the purpose, as she supposed, of procuring an abortion upon herself, though in fact she was not pregnant. The prisoner was indicted, not as an accessory before the fact to her murder, but for the substantive offence of manslaughter, and counsel and court both indulged in interesting and acute queries as to the nature of the offences, both that committed by the wife and that by the husband; and various speculations as to the nature of the offence were suggested. The grounds suggested by the prisoner's counsel upon which the court should hold that the facts in the case did not constitute the crime of manslaughter were, that the prisoner's wife, in wilfully committing an unlawful act which might cause her death, and which in fact did cause her death, was a *felo de se*, and therefore guilty of the crime of murder; and also that the facts proved against the defendant showed him to be merely an accessory to the crime; and as in law there could be no such offence as an accessory before the fact in manslaughter, no offence was charged. It was evidently a case of novel impression, and although one or more of the judges were in doubt whether the doctrine as laid down by Lord Hale, that there can be no accessory to manslaughter, might not admit of some qualification, under peculiar circumstances, we know only that the prisoner was held guilty of manslaughter without knowing any of the grounds upon which the decision was based; and the last remark of Pollock, C. B. was, "You have not satisfied me that, as far as the woman is concerned, she has been guilty of any offence at all." The interruptions of judges in the course of an argument are not adjudications, and nothing is adjudged in that case which bears upon the question under discussion.

The Declaration of Rights, prefixed to the Constitution of Massachusetts, art. 12, declares, among other things, that "no subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him."

It is to be observed that the Declaration of Rights is but a declaration of fundamental principles, by which all the departments of the government are to be bound in its administration. Neither of the departments of the government can do what it is forbidden by the Constitution to do, but each department is bound in its action to conform to its provisions, and each within its appropriate sphere to make proper provision for complying with its requisitions. Generally this is a duty which devolves upon the legislative department of the government; and the same article of the Declaration of Rights before quoted declares it to be the right of a subject "to produce all proofs that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his counsel, at his election;" and it also declares that "the Legislature shall not make any law that shall subject any person to a capital or infamous punishment, without trial by jury."

It is too plain for discussion that the true meaning is that the Legislature, in providing for the proceedings in courts of justice, shall not make any law which shall take away from a subject any one of the rights which by the fundamental law are declared to be his; and, in providing for the administration of the criminal law, they must do so in such manner as shall fully preserve to him all these rights. But it demands no more. It does not require that these rights shall be forced upon him by law, against his wish; and a law that subjects a person to any infamous punishment upon his plea of guilty is not a violation of the provision of the Constitution that the Legislature shall make no law to subject a person to infamous punishment without trial by jury. The whole spirit, and the letter also, of the Constitution, are observed by such legislation as shall enable the party charged with an offence, without unnecessary embarrassment or expense, to avail himself of these rights. In erecting courts, and providing for the administration of the criminal law, the Legislature is the proper body to determine the times and

places for holding courts, when and in what manner juries shall be required to be in attendance, and so to prescribe the course of proceeding as shall best promote the public interest and secure individual right.

In every case in which an indictment is presented against any person, there arise, of necessity, two distinct questions, one of law, the other of fact. They are to be tried by two different tribunals; the question of law must be ruled on by the court; the question of fact must be tried by the jury. We speak now of those questions of law which arise upon the indictment itself, and not of those which may be involved in a general verdict of guilty or not guilty. The question of law presented is this: Have the grand jury in their presentment described against the defendant an offence fully and plainly, substantially and formally, as required by the fundamental law? and that must be decided by the court. The question of fact is, Has the government sustained by proof the allegations against the defendant? and this question must be decided by the jury. The decision of neither of these questions involves the consideration of the other, and all experience confirms the proposition that each should be tried independently of the other. It is therefore not only a rightful, but a wise, exercise of legislative authority to say that they shall not be tried together, but that, if a party indicted contends that the charge against him is not properly described to him, he shall present that question for the decision of the court before the question of fact is presented to the jury. It is quite clear that the authority of the Legislature to require them to be tried separately includes the authority to prescribe the order in which they shall be tried. If it were competent to consider the propriety of the order which the Legislature has seen fit to adopt, that which has been prescribed is certainly most beneficial to the party charged; for when he alleges that there is nothing which he is bound to answer in the charge against him, it might operate with very great hardship to him to be subject to the annoyance, trouble and expense of settling a fact which when settled is immaterial. Still, it is undoubtedly within the power of the Legislature to prescribe any order of proceeding which is not oppressive; and we think that this order of proceeding was intended to be effected, and

was effected, by the St. of 1864, c. 250.* *Commonwealth v. Walton*, 11 Allen, 238. *Commonwealth v. Whitney*, 108 Mass. 5. *Commonwealth v. Wolcott*, 110 Mass. 67. *Green v. Commonwealth*, 111 Mass. 417.

The only objections taken in argument to the sufficiency of the second count are: 1st. That it omits to state the legal effect of the facts particularly set forth against the principals. 2d. That it does not sufficiently define the part of the body of the deceased on which the mortal wound was inflicted. 3d. That it does not allege the place at which the present defendant was an accessory before the fact. All these objections are purely formal, and do not affect the jurisdiction of the court. The accessory, under our statutes, would have been equally liable if he had not been at the time in the same county, or even within the Commonwealth. Gen. Sts. c. 168, § 5; c. 171, § 19. *Commonwealth v. Macloon*, 101 Mass. 1.

The entire force of the able argument of the defendant's counsel, therefore, depends upon the correctness of this proposition, which he attempts to maintain: "The statutes in regard to taking objections to indictments or complaints have no bearing upon this case, as there was no empanelling of a jury."

If this proposition is sound, the position of the defendant is also sound, unless we consider the entire indictment and reject all that is not well pleaded as surplusage, and find enough in the remainder to sustain the charge. We do not deem it necessary to inquire whether that may properly be done, because we are satisfied that, by the St. of 1864, the Legislature intended that questions of law apparent upon the record by reason of formal defects should be presented to the attention of the court before proceeding to verify the facts. The language of the second section is, in relation to objections to formal defects apparent on

* "Section 2. Any objection to a complaint, indictment or other criminal process, for any formal defect apparent on the face thereof, shall be taken by demurrer or motion to quash, assigning specifically the objections relied on before a judgment has been rendered by a trial justice or a police court, or a jury has been sworn in the Superior or Supreme Judicial Court.

"Section 3. No motion in arrest of judgment shall be allowed for any cause existing before verdict, unless the same affects the jurisdiction of the court."

the record, before "a jury has been sworn in the Superior or Supreme Judicial Court." The third section is much more broad, and is that "no motion in arrest of judgment shall be allowed for any cause existing before verdict, unless the same affects the jurisdiction of the court." If the language of the statute is to be construed with literal exactness, there has been in this case no empanelling of a jury, and no verdict. But neither the statute nor the Constitution itself is necessarily to be interpreted according either to its exactly literal or exactly technical meaning. The Constitution, in restraining the power of the executive, provides that "no charter of pardon, granted by the Governor with the advice of Council before conviction, shall avail the party pleading the same." Const. Mass. c. 2. § 1, art. 8. Conviction of a crime is never complete until judgment has been rendered upon that conviction; and yet so obvious was it that the purpose of the people in limiting the power of the executive in this respect was to prevent the granting of pardons before trial, that the verdict of a jury has been deemed sufficient, without a judgment of the court upon it, to authorize the Governor to grant his pardon. *Commonwealth v. Lockwood*, 109 Mass. 323. So if, with literal exactness, we should construe the language of the Constitution before referred to, that the Legislature should not make any law that shall subject a person to infamous punishment without trial by jury, a trial by jury must necessarily take place before the punishment could be awarded, whatever the plea might be. The true mode of construing both Constitution and statutes is to ascertain what purpose it is intended to accomplish, what mischief to remedy, and then to ascertain whether its language, taken all together, is sufficiently apt for the purpose.

It is entirely clear, taking the whole statute together, that it meant that there should be several stages in the course of a trial, at which different stages different proceedings should be had, and that the order of such proceedings should be, as before said, first, the sufficiency of the charge, in matter of form, so proceed to trial with, and second, the verification of the facts. It is impossible to imagine that the Legislature intended that the facts found by the verdict should be a more conclusive verification than the solemn confession of them by the party in open court; and it would be a very strange interpretation of the act to say

that it meant that, after all the facts were proved before a jury, the party against whom the facts were proved should be deprived of any privilege which he would have had by confessing in open court the truth of the facts thus proved. The true meaning of the statute is, that, when the proceedings have gone so far that there remains nothing to be done except the imposition of sentence, then formal defects previously existing shall not be availed of. The use of the phrase "before a jury has been sworn" confirms this view; for the empanelling of a jury and all the proceedings up to the time of their verdict are in law a single act, and the use of the phrase "before a jury has been sworn" in this section, and "before verdict" in the third section, is decisive that the Legislature intended that matters of mere form must be presented before entering upon the investigation of the facts; and that if, after the trial is entered upon, it shall appear during the course of such investigation that the facts proved do not in point of law sustain the charge in the indictment, any objection on that ground shall be made before verdict, that is, before such investigation is terminated: so that when, in the due course of proceedings, the facts charged against the party shall be verified, his right to interpose formal objections which existed prior to the verification of the facts shall be precluded. This view of the law takes from him no right. If he desires to interpose any merely technical or formal objection, he may do so at the proper stage of the proceedings; and if his objection is not sustained, he can take the judgment of the ultimate tribunal as well after a plea of guilty as after a verdict.

If, therefore, this view be correct, that merely formal objections of law must be taken before entering upon the consideration of facts, and if all questions of law arising in the course of the trial must be presented before the final determination of the facts, — and we cannot doubt that this is the true construction of the statute, — it follows that the motion in arrest of judgment must be overruled, and the defendant

Sentenced for murder in the second degree.

COMMONWEALTH vs. BOSTON & MAINE RAILROAD.

Middlesex. Jan. 29. — Oct. 23, 1880. MORTON, J., absent. LORD, J., did not sit.

A passenger on a railroad left the train of cars after the conductor had called out the name of the station to which he was entitled to be carried, and the car in which he was had passed the station and had almost stopped; and, while crossing to the station, was killed by a locomotive engine on a parallel track, the approach of which he might have seen had he looked before leaving the train. *Held*, on an indictment against the railroad corporation, on the St. of 1874, c. 372, § 163, that, if an indictment would lie for the death of a passenger not in the exercise of due care, the person killed had ceased to be a passenger by leaving the train while in motion.

INDICTMENT in nine counts, on the St. of 1874, c. 372, § 163, for causing the death of John H. R. Hill. Some of the counts charged that Hill was a passenger; and others that he was not a passenger, nor in the employment of the defendant corporation, and that he was in the exercise of due care.

At the trial in the Superior Court, before *Rockwell, J.*, there was evidence tending to show that Hill left Boston on October 22, 1878, as a passenger on a train of cars of the defendant for Oak Grove; that, before reaching the station, the conductor called out "Oak Grove," and the train slowed up, and, when opposite the station, almost stopped, but started again as the engineer saw a train approaching on a parallel track between the track his train was on and the station; that Hill stepped off of the platform of a car, which had passed the station, just before the train started, reached the ground in safety, and was killed by the approaching train while crossing to the station; that, if he had remained on the car, he would not have been injured; that, if he had looked before getting off, he would have seen the approaching train; and that the defendant was negligent in the management of this train.

The defendant asked the judge to rule that Hill, by voluntarily leaving the train while it was in motion, ceased to be a passenger; and that there was no evidence to support any of the counts of the indictment. The judge declined so to rule; and instructed the jury that, if the train had arrived at the station, although it had not entirely stopped, and Hill stepped off,

without injury from the train he had been on, and, while on his way to the platform by the way provided, was injured by the gross negligence of the defendant, they might return a verdict of guilty, although Hill was not in the exercise of due care. The jury returned a verdict of guilty; and the defendant alleged exceptions.

D. S. Richardson & G. F. Richardson, for the defendant.

T. H. Sweetser & G. A. James, for the Commonwealth.

SOULE, J. It is contended on the part of the government that, where the person killed was a passenger, the statute does not require, in order to the maintenance of an indictment, that he should have been using due care. But whether this is so or not need not be decided, because, in the opinion of a majority of the court, when Hill was killed he was not a passenger within the meaning of the statute.

It is undoubtedly true that one who has bought a ticket, or otherwise become entitled to transportation on a particular train of cars of a railroad corporation, is ordinarily a passenger of the corporation from the time when he reasonably and properly starts from the ticket-office or waiting-room in the station to take his seat in a car of the train, till he has reached the station to which he is entitled to be carried, and has had an opportunity, by safe and convenient means, to leave the train and roadway of the corporation at that station. *Warren v. Fitchburg Railroad*, 8 Allen, 227. The duty of the corporation toward him is to furnish a well-constructed and safe road, suitable engine and cars, competent and careful enginemen, conductors and other necessary laborers, in order that all injuries which human foresight can guard against may be prevented. But this duty rests on the corporation only so long as the passenger sees fit to be carried by it; and, if he chooses to abandon his journey at any point before reaching the place to which he is entitled to be carried, the corporation ceases to be under any obligation to provide him with the means of travelling further. And while it is true that, if he leaves the train while it is at rest at a station, he is entitled to an opportunity so to do in safety, it is equally true that the corporation is not under any obligation to make it safe for him to leave the train while it is in motion, and that, if he does so, he assumes all risk of injury. *Gavett v. Manchester &*

Lawrence Railroad, 16 Gray, 501. It would not be contended by any one that an indictment under the statute could be maintained against a railroad corporation for causing the death of one who, without looking to see if the track was clear, jumped from a train which was running at ordinary speed between stations, and was immediately afterward killed by the engine of a train going in the opposite direction on another track. The indictment would fail because the facts showed that the corporation owed no duty to the deceased. He would have ceased to be a passenger, by voluntarily leaving the train at a place and time when and where the corporation could not anticipate that he would leave it, and when and where the corporation was under no obligation to see that he had an opportunity to leave its roadway in safety after leaving the train. He would have become an intruder on the track of the corporation, acting without any regard to the dangerous character of the situation, and not entitled to protection against the consequences of his own negligence. The principle involved in the supposed case is involved in and governs the case at bar.

So long as the train was in motion, Hill could not leave it and still retain his right to protection till he had left the roadway of the corporation. By leaving the train while in motion, he ceased to be a passenger, and to have the rights of a passenger, as completely, though the train was moving slowly, and was near by the station, as if he had left it while moving at full speed between stations. *Hickey v. Boston & Lowell Railroad*, 14 Allen, 429. The fact that the car in which Hill was had passed the platform of the station to which he was entitled to be carried did not give him the right to leave the train at the risk of the company. If he sustained any injury by being carried beyond the station, his remedy would be by an action, counting on that injury.

Hill, having ceased to be a passenger, was on the track of the defendant's road under circumstances which preclude the idea that he was in the exercise of due care. The evidence on this point is all in one direction, and is to the effect that, if he had looked, he could not have failed to see that the approaching train on the other track was so near that he could not cross the track before it would strike him.

It follows that the defendant was right in asking the ruling that there was no sufficient evidence to support either count of the indictment. There was no evidence to support the counts in which Hill is alleged to have been a passenger, because, by his voluntary act, he had ceased to be a passenger, or to be entitled to protection as a passenger. There was no evidence to support the counts in which he is alleged not to have been a passenger, because there was no evidence that he was in the exercise of due care.

Exceptions sustained.



ISAAC STONE vs. GEORGE H. SARGENT.

Hampshire. Sept. 22. — Oct. 7, 1880. COLT & MORTON, JJ., absent.

This court has jurisdiction of a bill of exceptions allowed by a judge of the Superior Court to his order granting a petition for the removal of a cause into the Circuit Court of the United States, although the case has been entered in that court.

The right of a citizen of another State to remove into the Circuit Court of the United States a suit between himself and a citizen of the State in which the suit is brought, at any time before the trial, upon making affidavit of his belief and reason to believe that from prejudice or local influence he will not be able to obtain justice in the State court, given by former acts of Congress, is not taken away by the act of March 3, 1875.

A hearing before an auditor is not a "trial," within the meaning of the U. S. Rev. Sts. § 639, cl. 3, giving the right to remove a cause before trial from a State court into the Circuit Court of the United States; and consent to the appointment of an auditor is no waiver of such right of removal.

A question not raised in the court below is not open upon a bill of exceptions.

CONTRACT to recover \$25,000 under a special agreement. Writ dated August 17, 1877, and returnable at October term 1877 of the Superior Court. At June term 1878, the defendant having filed his answer, the case was referred by agreement of parties and rule of court to an auditor. A hearing was had before the auditor, and his report was made and returned to the court, and was among the papers in the case, but no note of its having been filed appeared in the report or on the docket. At June term 1879 the case was upon the trial list.

At October term 1879, and before any trial by the court or the jury, the defendant filed a petition for the removal of the case into the Circuit Court of the United States, alleging that he was a citizen of New York and the plaintiff a citizen of this Commonwealth, and that the amount in dispute, exclusive of costs, exceeded the sum and value of \$500; and supported by his affidavit that he had reason to believe and did believe that from prejudice and undue influence he should not be able to obtain justice in the Superior Court. To that petition the plaintiff filed an answer, admitting the citizenship of the parties and the amount in dispute, but alleging that any right which the defendant might have had to remove the case into the Circuit Court had been waived: 1st. By omitting to file his petition before or at the term at which the case might have been tried; 2d. By consenting that the case should be referred to the auditor, and by the proceedings before him.

At the same term of the Superior Court, before *Brigham, C. J.*, the plaintiff offered evidence that the auditor read his report to the attorneys of the parties on the Saturday before June term 1879, and that it was then expressly understood and agreed that neither party should object that the auditor's report was not on file before the first day of that term. But the judge excluded the evidence as immaterial on the question of removal, and ordered the case to be removed as prayed for. To this ruling and order exceptions were alleged by the plaintiff, and allowed by the judge.

The defendant now moved this court to dismiss the bill of exceptions for want of jurisdiction, because, as appeared by copies which he produced, attested by the clerk of the Circuit Court, the case had been entered in that court, and the plaintiff had there appeared and filed a motion to remand the case to the State court for the same reasons stated in his answer to the petition for removal.

C. Delano, for the defendant, in support of the motion, cited *Dillon on Removal of Causes* (2d. ed.) 67, 79 and notes; *Insurance Co. v. Dunn*, 19 Wall. 214, 225; *Matthews v. Lyall*, 6 McLean, 13; *Taylor v. Rockefeller*, 6 W. N. C. (Penn.) 283; *Dennistoun v. Draper*, 5 Blatchf. C. C. 336, 338; *Hatch v. Chicago, Rock Island & Pacific Railroad*, 6 Blatchf. C. C. 105; *Fisk*

v. *Union Pacific Railroad*, 6 Blatchf. C. C. 362, and 8 Blatchf. C. C. 243, 249; *Wormser v. Dahlman*, 16 Blatchf. C. C. 319; *Fulton v. Golden*, 8 Reporter, 517; *Penrose v. Penrose*, 9 Reporter, 586, 809; *Arthur v. New England Ins. Co.* 7 Reporter, 329; *Kelly v. Virginia Ins. Co.* 3 Hughes, 449; *Cobb v. Globe Ins. Co.* 3 Hughes, 452; *Dennis v. Alachua County*, 3 Woods, 683; *Osgood v. Chicago, Danville & Vincennes Railroad*, 6 Biss. 330; *Empire Transportation Co. v. Richards*, 88 Ill. 404; *Beery v. Chicago, Rock Island & Pacific Railroad*, 64 Misso. 533; *Stewart v. Mordecai*, 40 Ga. 1; *Tarver v. Ficklin*, 60 Ga. 373.

THE COURT, without calling on *D. W. Bond*, for the plaintiff, in opposition to the motion, directed the exceptions to be argued; and they were argued by the same counsel; *Delano* being heard only upon the question whether the act of Congress of March 2, 1867, reenacted in the U. S. Rev. Sts. § 639, *cl.* 3, had been repealed, so far as applicable to this case, by the act of Congress of March 3, 1875.

GRAY, C. J. Among the provisions of former acts of Congress, concerning the removal of causes from the State courts to the Federal courts, which are substantially reenacted in the Revised Statutes of the United States, are those of the act of March 2, 1867, by which any suit commenced in any court of a State between a citizen of that State and a citizen of another State, in which the amount in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars, may be removed for trial into the Circuit Court of the United States next to be holden for the district in which the suit is pending, upon the petition of the citizen of the other State, whether he be plaintiff or defendant, filed "at any time before the trial or final hearing of the suit," and supported by his affidavit that he has reason to believe and does believe that from prejudice or local influence he will not be able to obtain justice in the State court, and upon his offering good and sufficient surety for his entering in the Circuit Court, on the first day of its session, copies of the process against him, and of all pleadings and proceedings in the cause, and for his appearance there. The act provides that "it shall thereupon be the duty of the State court to accept the surety, and to proceed no further in the cause against the petitioner;" and that, "when the said copies are entered as aforesaid in the Circuit Court, the

cause shall there proceed in the same manner as if it had been brought there by original process," and the copies of pleadings shall have the same force and effect as the originals. U. S. Rev. Sts. § 639, *cl.* 3.

As appears by the authorities cited by the learned counsel for the defendant, if the case is within the act of Congress, and the proper petition, affidavit and surety are filed in the State court, the Circuit Court of the United States takes jurisdiction of the cause, although the State court omits, or even refuses, to make any order for its removal. In other words, the jurisdiction of the Federal court over a case in which the conditions of the act of Congress have been complied with cannot be defeated by any action or omission of the State court.

On the other hand, it is the duty of the State court, before relinquishing jurisdiction of a cause once lawfully brought before it, and discharging that cause from its own docket, to be satisfied that there has been a compliance with those conditions. If the highest court of the State errs in holding that the petitioner is not entitled to remove the cause, its judgment may be revised and reversed on writ of error by the Supreme Court of the United States, and all proceedings had in the courts of the State after due application for a removal may be ordered by that court to be set aside. But no act of Congress, and no adjudication of the Supreme Court of the United States, has made the opinion of the State court, upon the question whether its own jurisdiction must be surrendered, subordinate to the opinion of any Federal tribunal below the Supreme Court.

It is, to say the least, a matter of grave doubt whether the Circuit Court of the United States, in such a case as this, could issue a writ of mandamus or of certiorari to the State court; and if it could, it would only be when no copy of the record had been filed in the Circuit Court, and to obtain such a copy for the purpose of guiding its own proceedings, and not to restrain or control the judicial action of the State court. *Ex parte Turner*, 3 Wall. Jr. 258. *Murray v. Patrie*, 5 Blatchf. C. C. 343; *S. C.* cited 6 Blatchf. C. C. 382-386; *S. C. nom. Justices v. Murray*, 9 Wall. 274, 276 note. *Hough v. Western Transportation Co.* 1 Biss. 425. *In re Cromie*, 2 Biss. 160. *Osgood v.*

Chicago, Danville & Vincennes Railroad, 6 Biss. 380. *Scott v. Clinton & Springfield Railroad*, 6 Biss. 529. *United States v. McKee*, 4 Dill. 1.

In Dillon on Removal of Causes (2d ed.) 77-79, it is said that the Circuit Court of the United States has the power to protect its suitors by injunction against a judgment rendered in the State court after a proper application to remove the cause. But the only authority there cited is *French v. Hay*, 22 Wall. 250, in which the circumstances were very peculiar, and the judgment in no way supports the position of the learned author. In that case, the principal cause had been removed without objection from a State court of Virginia into the Circuit Court of the United States, and the State court of Virginia had not undertaken to retain jurisdiction thereof. The injunction issued by the Federal court was not against proceeding with the original suit in the State court of Virginia, but against prosecuting a new suit, commenced in the courts of another State after the right of removal had been perfected, upon a decree rendered in the State court of Virginia before the application for removal. The judgment is limited by its language, as well as by the facts before the court, to injunctions to stay suits commenced after the jurisdiction of the Federal court has attached; and in any other view would be inconsistent, not only with the clear terms of the acts of Congress, but with earlier and later decisions of the Supreme Court of the United States. U. S. St. March 2, 1793, § 5. U. S. Rev. Sts. § 720. *Diggs v. Wolcott*, 4 Cranch, 179. *Watson v. Jones*, 13 Wall. 679, 719. *Haines v. Carpenter*, 91 U. S. 254. *Dial v. Reynolds*, 96 U. S. 340. See also Bradley, J., in *Live Stock Association v. Crescent City Co.* 1 Abbott U. S. 388, 404-407; *S. C.* 1 Woods, 21, 34-36.

The inconvenience of the construction for which the defendant contends may be made more apparent by applying it to a case in which the amount in dispute is more than five hundred and less than five thousand dollars. Such a case, in the event of a decision in the highest court of the State against a right claimed under the act of Congress, could be taken by writ of error to the Supreme Court of the United States. U. S. Rev. Sts. § 709. But a decision of the Circuit Court of the United States in favor of such a right could not be reëxamined in the Supreme Court.

U. S. Rev. Sts. § 691. U. S. St. February 16, 1875, § 3. So that the effect would be to make the decision of a Circuit Court of the United States paramount to the deliberate judgment of the highest court of the State.

This court has uniformly held that any court of the Commonwealth, before declining the further exercise of jurisdiction over a cause, must consider and determine whether, upon the record and papers before it, the petitioner has brought himself within the acts of Congress; and that the ruling of a judge of this court or of the Superior Court upon that question may be revised in the full bench of this court upon bill of exceptions or report of the judge. *Commonwealth v. Casey*, 12 Allen, 214. *Morton v. Mutual Ins. Co.* 105 Mass. 141. *Bryant v. Rich*, 106 Mass. 180. *Florence Sewing Machine Co. v. Grover & Baker Co.* 110 Mass. 70. *Mahone v. Manchester & Lawrence Railroad*, 111 Mass. 72. *Galpin v. Critchlow*, 112 Mass. 339. *Gordon v. Green*, 113 Mass. 259. *DuVivier v. Hopkins*, 116 Mass. 125. *New York Warehouse Co. v. Loomis*, 122 Mass. 431. And, notwithstanding some dicta of the learned justice who delivered the opinion in *Insurance Co. v. Dunn*, 19 Wall. 214, 223, having an opposite tendency, the practice of this court in this regard is upheld by many decisions of the Supreme Court of the United States, of which it will be sufficient to cite a few of the more recent.

In *Florence Sewing Machine Co. v. Grover & Baker Co.* 110 Mass. 70, a defendant filed a petition for a removal of the case into the Circuit Court of the United States under the act of Congress of 1867, which was refused by a justice of this court, upon the ground that the case was not within the act; and upon exceptions to such refusal, and to his rulings at the subsequent trial, his decision was affirmed by the full court. The case was nevertheless entered in the Circuit Court of the United States, and a motion of the plaintiff to remand it was overruled by that court. 1 Holmes C. C. 235. But the Supreme Court of the United States, on a writ of error to this court, affirmed its judgment, without a suggestion that there was any irregularity in its proceedings, or that it had lost its jurisdiction of the case by the entry thereof in the Circuit Court. 18 Wall. 553.

So in *Bryant v. Rich*, 106 Mass. 180, a justice of the Superior Court declined to grant a petition for removal under the same

act of Congress, on the ground that it was filed too late; and exceptions were taken to his decision and were overruled by this court. The Supreme Court of the United States, upon writ of error, held, in the words of Chief Justice Waite, that "the transfer was properly refused," and affirmed the judgment. *Vannevar v. Bryant*, 21 Wall. 41. A similar decision was made upon a writ of error to the Supreme Court of Iowa in *Railroad Co. v. McKinley*, 99 U. S. 147.

In *Fashnacht v. Frank*, 23 Wall. 416, an alien, whose property had been ordered, by a decree of a district court of the State of Louisiana, to be sold at the suit of a citizen of that State holding a mortgage thereon, obtained from the same court a temporary injunction, which, upon hearing, was dissolved; and afterwards filed a petition, under the act of Congress of July 27, 1866, for the removal of the case into the Circuit Court of the United States, which was refused, and he then appealed from the decree dissolving the injunction to the Supreme Court of Louisiana, which affirmed that decree. The Chief Justice of the United States, in delivering the judgment of the Supreme Court dismissing for want of jurisdiction a writ of error to the State court, said that the petition for removal "was at once very properly overruled, for the reason that a final judgment had already been rendered," and that the appeal to the Supreme Court of the State "was clearly the appropriate remedy for the correction of the errors of the district court, if there were any."

In another case, a defendant's petition for removal under the Judiciary Act of 1789, which alleged the citizenship of the plaintiff at the date of the petition, but not at the time of the commencement of the action, was for that reason refused by the Supreme Court of the State of New York, and its judgment affirmed in the Court of Appeals. *Pechner v. Phoenix Ins. Co.* 6 Lansing, 411, and 65 N. Y. 195. The case was taken by writ of error to the Supreme Court of the United States; and it was there argued that the compliance with the conditions of the act of Congress ousted the Supreme Court of New York of its jurisdiction, and all further proceedings therein were void. But the judgment was affirmed; the Chief Justice saying, "This right of removal is statutory. Before a party can avail himself

of it, he must show upon the record that his is a case which comes within the provisions of the statute. His petition for removal, when filed, becomes a part of the record in the cause. It should state facts which, taken in connection with such as already appear, entitle him to the transfer. If he fails in this, he has not, in law, shown to the court that it cannot 'proceed further with the cause.' Having once acquired jurisdiction, the court may proceed until it is judicially informed that its power over the cause has been suspended." "The court had the right to take the case as made by the party himself, and not inquire further. If that was not sufficient to oust the jurisdiction, there was no reason why the court might not proceed with the cause." 95 U. S. 183. A like decision was made where petitions under the act of 1867 contained defective allegations of the citizenship of the adverse party; and the Chief Justice said, "Holding, as we do, that a State court is not bound to surrender its jurisdiction upon a petition for removal until at least a petition is filed, which, upon its face, shows the right of the petitioner to the transfer, it was not error for the court to retain these causes." *Amory v. Amory*, 95 U. S. 186.

In the very recent case of *Meyer v. Construction Co.* 100 U. S. 457, a defendant in an inferior court of the State of Iowa filed a petition under the act of Congress of March 3, 1875, for a removal of the cause into the Circuit Court of the United States. The State court refused the petition, because one of the two sureties on the bond offered was an attorney of the court, who was forbidden by the law and practice of Iowa to be a surety; and because the petition was filed too late, after the trial had begun. The defendant, notwithstanding, obtained from the clerk a copy of the record, and filed it in the Circuit Court of the United States, and that court overruled a motion of the plaintiff to remand the cause. The State court, against the protest of the defendant, proceeded with the cause, and entered a final decree for the plaintiff, and the defendant appealed therefrom to the Supreme Court of the State, which affirmed that decree. The cause also proceeded in the Circuit Court of the United States, and there resulted in a decree for the defendant. The matter was brought before the Supreme Court of the United States by writ of error to the State court, and by appeal

from the decree of the Federal court. The Supreme Court of the United States held that the cause was legally removed, because one of the sureties was admitted to be sufficient, and the act of Congress did not require more than one, and because upon the facts appearing on the record the trial had not begun when the petition for removal was filed; and that the defendant had not, by taking part under protest in the subsequent proceedings in the State court, waived his right to insist that the cause had been so removed. The Supreme Court, on the writ of error, reversed the judgment of the Supreme Court of Iowa, and remanded the cause to that court, with instructions to reverse the decision of the inferior court of the State, and to direct that court to proceed no further with the suit; and, on the appeal, reversed the decree of the Circuit Court of the United States upon the merits, and remanded the cause for further proceedings in that court. But no suggestion was made that the State court had no authority, for the purpose of ascertaining whether it should retain jurisdiction of the cause, to consider whether the provisions of the act of Congress had been complied with. On the contrary, the Chief Justice, in delivering judgment, clearly implied that, if the sufficiency of the surety, or the citizenship of either party, had been denied in point of fact, the State court might have inquired into it, and added, "We fully recognize the principle, heretofore asserted in many cases, that the State court is not required to let go its jurisdiction until a case is made, which, upon its face, shows that the petitioner can remove the cause as a matter of right."

The bill of exceptions allowed by the Chief Justice of the Superior Court to his order granting the petition for a removal of the cause into the Circuit Court of the United States is therefore rightly before us, and the motion to dismiss it for want of jurisdiction must be denied. But, upon consideration of the exceptions, we are of opinion that they cannot be sustained.

The petition for removal was filed "before the trial" of the suit in the State court, as required by the U. S. Rev. Sts. § 639, *cl.* 8; and we concur in the opinion, which has been expressed by Mr. Justice Miller, and, so far as we are informed, by every other Federal judge who has had occasion to decide the question,

that the act of Congress of March 8, 1875, which provides that, in any suit between citizens of different States, either party may file a petition for removal, without any affidavit, "before or at the term at which said cause could be first tried and before the trial thereof," and which repeals only such acts and parts of acts as are in conflict with its provisions, has not taken away the right of a citizen of another State to remove a suit between himself and a citizen of the State in which the suit is brought, at any time before the trial, upon making affidavit of his belief and reason to believe that from prejudice or local influence he will not be able to obtain justice in the State court. *Dillon on Removal of Causes*, 29. *Arapahoe County v. Kansas Pacific Railway*, 4 Dill. 277, 287. *Cooke v. Ford*, 16 Am. Law Reg. (N. S.) 417. *Whitehouse v. Continental Ins. Co.* 2 Fed. Rep. 498. See also *Bible Society v. Grove*, 101 U. S. 610.

The hearing before an auditor, who determines nothing finally, but whose report is, by the Gen. Sts. c. 121, § 46, only *prima facie* evidence upon a subsequent trial before the court or jury, is not a trial, within the meaning of the acts of Congress; and consent to the appointment of an auditor is no waiver of the right to remove before trial under the U. S. Rev. Sts. § 639, cl. 3. In *Hanover Bank v. Smith*, 13 Blatchf. C. C. 224, cited for the plaintiff, the party who was held to have waived his right of removal had consented, upon the case being called for trial in court, and in order to avoid such trial, that it should be tried by a referee named.

The objection made at the argument, on the authority of *McMurdy v. Connecticut Ins. Co.* 9 Chicago Legal News, 324, and *Torrey v. Grant Locomotive Works*, 14 Blatchf. C. C. 269, that the bond given, being in accordance with the provisions of the act of Congress of 1867 and of the U. S. Rev. Sts. § 639 only, and not with those of the act of 1875, because it did not contain a stipulation for the payment of costs in the Circuit Court if that court should remand the case, was therefore insufficient, does not appear by the bill of exceptions to have been taken in the court below, and is not open in this court.

Exceptions overruled.

WILLIAM G. BASSETT, Judge of Probate, *vs.* DAVID W.
CRAFTS & another.

Hampshire. Sept. 21. — Oct. 22, 1880. COLT & MORTON, JJ., absent.

By a marriage settlement made in another State, personal property was conveyed to two trustees, "and the survivor of them, his heirs, executors, administrators and assigns," on certain trusts during the joint lives of the husband and wife, with power of nomination by them in case of a vacancy in the office of trustee, and, on the death of both the husband and wife, in trust for the use of the issue of the marriage. *Held*, on the death of both trustees, and of the husband and wife leaving issue, that the Probate Court of a county in this Commonwealth, where the property then was, and where some of the issue lived, had jurisdiction to appoint a new trustee.

If a Probate Court, having jurisdiction of the subject matter, appoints a trustee, under the Gen. Sta. c. 100, § 9, without notice to all the parties interested, the sureties on the trustee's bond cannot, in an action against them on the bond, impeach the validity of the appointment.

CONTRACT against the sureties on a bond executed on May 3, 1871, by them, and by A. P. Peck as principal to the judge of the Probate Court for the county of Hampshire, in the penal sum of \$15,000, and conditioned for the faithful performance by Peck of the duties of trustee under a marriage settlement. The answer contained a general denial; and alleged that the bond was void, and that the Probate Court had no jurisdiction to appoint Peck trustee, or to require or take the bond. The case was submitted to this court on agreed facts, in substance as follows:

In 1822, James Hibben, Jr., of the first part, Rebeckah Theus Stiles, of the second part, and Thomas Napier and James Hibben, Sr., of the third part, all of the city of Charleston, in the State of South Carolina, executed a marriage settlement, by which certain personal property of the party of the second part was conveyed to the parties of the third part, "and the survivor of them, his heirs, executors, administrators and assigns," in trust, for the use of the party of the second part until her intended marriage with the party of the first part, and after said marriage, during the joint lives of the parties of the first and second parts, to permit the party of the first part to receive the income during his life, and on the same trusts in case she should die before him leaving issue; and from and after the

death of the party of the first part, leaving issue, "then in trust to and for the use and benefit and behoof of such child or children, grandchild or grandchildren, his or her or their heirs, executors, administrators or assigns forever, if more than one as tenants in common," grandchildren taking by right of representation. It was further provided that, in case either or both the trustees should die before the trusts were performed, it should be lawful for the parties of the first and second part to nominate a trustee to whom the trustee for the time being, or, "if all the trustees shall be then dead, the heirs, executors or administrators of the surviving trustee, shall convey" the trust estate, so that the same should be vested in the persons appointed trustees.

After the execution of the indenture, the parties of the first and second part were married. The wife died, October 10, 1838, at Northampton, in this county, and the husband died at the same place, February 1, 1871, leaving issue of the marriage surviving. One of the trustees died in 1835, and the other died in 1860, at Charleston, South Carolina, leaving heirs, and a will of which E. M. Grimké was duly appointed executor in South Carolina, and he still continues in that trust. This will was never proved in this Commonwealth, and he left no property here except the trust estate. No trustee was nominated under the marriage settlement in place of those originally appointed.

On May 2, 1871, A. P. Peck presented a petition to the Probate Court for this county, representing that Rebeckah Theus Hibben by her marriage settlement gave certain property, now in the county of Hampshire, for the use and benefit of her children and their legal representatives, namely, Simeon Theus Hibben, Rebecca N. Stedman, Thomas Napier Hibben, Sarah A. Peck, James Hibben, minor son of James Hibben, Jr., Anna Napier Greenfield and Thomas Napier Greenfield, minor children of Mary Hibben Greenfield; that Thomas Napier, appointed trustee under the marriage settlement, was now dead, and no one was authorized to collect and distribute the trust estate; and praying that the petitioner be appointed trustee.

Simeon T. Hibben, Rebecca N. Stedman and Sarah A. Peck, representing that they were the only persons now residing

in the United States interested in the trust, requested that the prayer of the petition be granted without further notice. Stephen Day, guardian of James Hibben, also requested that the petitioner be appointed trustee.

On May 8, 1871, by a decree of the Probate Court, without further notice to the parties interested, A. P. Peck was appointed trustee, and executed with the defendants the bond in suit. Subsequently he received, as trustee, property in this county to the amount of \$18,000, a portion of which he has distributed to the parties entitled thereto, including the minor children of Mary Greenfield; and a nominal breach of the conditions of the bond is admitted.

If the action could be maintained, judgment was to be entered for the penal sum named in the bond, and the amount for which execution was to issue to be ascertained in the usual way; otherwise, judgment for the defendants.

J. C. Hammond, for the plaintiff.

G. M. Stearns, for Crafts.

D. W. Bond, for the other surety.

ENDICOTT, J. Under this marriage settlement, no provision is made for the appointment of a trustee or trustees to fill vacancies after the death of Mr. and Mrs. Hibben; and, as the parties interested, or some of them, resided here, and portions of the trust estate were invested in this county, the Probate Court had jurisdiction of the subject matter, and authority to appoint Peck trustee under the marriage settlement. Gen. Sts. c. 100, § 9. This section provides that "the Probate Court or Supreme Judicial Court shall, after notice to all persons interested, appoint a new trustee." This imposes a duty on the court of giving such notice, whenever, in the exercise of its jurisdiction on a petition properly before it, a trustee is to be appointed. The statute does not mean that the court acquires jurisdiction by giving the notice; or, in other words, that it has no jurisdiction until after giving notice to all parties interested. The jurisdiction depends upon other considerations. This provision relates to the form of proceeding in making the appointment; and we are of opinion that the regularity of the proceedings cannot be inquired into in this action, on the ground that all the parties in interest did not assent to it.

appointment of Peck, and no notice issued to those who did not assent.

In *Emery v. Hildreth*, 2 Gray, 228, the action was by an administrator against a stranger to recover a debt due the estate. The defendant objected to the jurisdiction of the Probate Court, and to the regularity and sufficiency of the appointment of the administrator on several grounds, one of which was, that there was no citation or notice to the next of kin or creditors. But it was held that, the Probate Court having jurisdiction of the subject, the regularity of the proceedings in the appointment could not be drawn in question by the defendant. See *Marcy v. Marcy*, 6 Met. 360; *White v. Clapp*, 8 Met. 365, 370; *Waters v. Stickney*, 12 Allen, 1. When the Probate Court has no jurisdiction over the subject matter, then the appointment of a trustee is invalid, and a bond given in pursuance thereof cannot be enforced against his sureties. *Conant v. Newton*, 126 Mass. 105. *Sigourney v. Sibley*, 21 Pick. 101, and 22 Pick. 507.

It was said in *Shaw v. Paine*, 12 Allen, 298, that the appointment of new trustees in that case was not authorized by the statute, because no notice had been given to the parties in interest; but, as the provisions made by the will for the appointment of new trustees had been strictly followed by the court, the appointment was decided to be good without notice to the parties interested in the trust. The judge of probate therefore did not act under the statute, but under the provisions of the will. The case cannot be regarded as deciding that the jurisdiction of the Probate Court depends in all cases upon giving the notice required by the statute; and that the regularity of its proceedings, as to notice in appointing a trustee, can be questioned collaterally or by the trustee or his sureties.

In *People v. Norton*, 5 Selden, 176, the facts are substantially the same as in the case at bar. The Court of Chancery in New York, having jurisdiction of the subject matter, removed a trustee, and appointed a new trustee, who gave bond with sureties. The action was brought on the bond against one of the sureties, and he objected that the *cestuis que trust* had no notice of the appointment. Chief Justice Ruggles in dealing with this objection said: "This is an objection which neither the trustee nor his surety can be allowed to make. Lynch got possession of the

trust estate under the proceeding by color of which he claimed to be trustee, and Norton voluntarily undertook as his surety that he should faithfully administer the trust. If the proceeding was irregular for want of notice to the children of Mrs. Lynch, they might object to it in proper manner for that cause; but Lynch, having obtained the property upon pretence of being the trustee, cannot be permitted to deny his liability to account as such. The defendant, who voluntarily became his surety in order that he might take the trust property, is for a like reason precluded from denying his liability as surety. The order for changing the trustee and the bond given in pursuance of it must therefore be regarded as valid." See also *Budd v. Hiler*, 8 Dutch. 43; Perry on Trusts, § 275, and cases cited.

What, upon the facts set forth in the agreed statement, would be the rights of the parties in interest who received no notice, should they deny the validity of the appointment, we are not called on to consider.

Judgment for the penal sum of the bond.

GEORGE G. BAKER vs. AMAZIAH MAYO.

Hampden. Sept. 29.—Oct. 21, 1880. COLT & MORTON, JJ., absent.

A partner who advances money for the use of his firm is entitled to interest upon it.

The fact that one partner deposits, in his own name, in a bank the funds of the firm and his own funds, and draws checks thereon in payment of his private debts and the firm debts, does not preclude a finding that he is entitled to interest on money advanced by him for the use of the firm, in the absence of evidence that the firm was injured by his manner of depositing money.

Under a general exception to a master's report to the allowance of interest, the excepting party is not entitled to object to the rate of interest allowed.

BILL IN EQUITY to settle the affairs of a partnership. The case was referred to a master, to whose report the plaintiff filed four exceptions, the first and second of which related to items which the plaintiff contended should be included in the principal sum found due, and the others related to the allowance of interest on money advanced by the defendant to the firm. At the

hearing, before *Soule, J.*, the parties agreed that on a final decree the first and second exceptions might be considered as correctly taken; and the questions arising on the other exceptions were reserved for the consideration of the full court, and appear in the opinion.

M. P. Knowlton, for the plaintiff.

G. M. Stearns, for the defendant.

ENDICOTT, J. These parties were partners under an oral agreement, and, as such, entered into a contract to build a prison for the Commonwealth, the profits and loss of which undertaking they were to share equally. The master does not find the amount of capital which each was to contribute, or that there was any agreement on that subject; but he states that of the capital required for the business less than one thousand dollars was furnished by the plaintiff, and that all the other capital was furnished by the defendant. He also finds that the defendant advanced for the use of the firm \$27,064, which was used by the firm for nearly three years. It does not appear that the defendant was under any obligation to furnish this sum, or that he did furnish it as capital to become the property of the firm. The master, therefore, might properly find that the firm was indebted to the defendant in this amount, as money advanced to and used by the firm; and that it was just and reasonable that the defendant should receive interest thereon in the settlement of the partnership accounts, although there was no special agreement between the partners on that subject. The evidence is not reported, and we cannot say that the master erred in thus deciding. While, as a general rule, a partner cannot withdraw his capital during the continuance of the firm, and cannot be allowed interest upon it in the absence of an agreement to that effect, yet there is no rule of law which precludes him from receiving interest on money advanced for the use of the firm.

It also appears that the business was mainly conducted by the defendant, and that the partnership funds were deposited in the bank in his name. The money received from the State, the sum of \$27,064 advanced by him to the firm, and money for the payment of checks for his private debts were deposited together in the name of the defendant; and he drew on this deposit for the payment of partnership debts and for his private debts. It must

be presumed that this arrangement was with the knowledge and consent of the plaintiff; and it is not found by the master that the partnership was damaged thereby, or that the defendant used the partnership funds for his private purposes. He was not, therefore, required to find, on these facts, that any interest should be charged to the defendant on the partnership funds thus deposited in his name.

The plaintiff took no exception in terms to the rate of interest allowed by the master; and, under the exceptions actually taken, he is not entitled to object to the rate allowed.

The plaintiff's third and fourth exceptions must, therefore, be overruled, and a decree entered in accordance with the master's report, modified by the agreement of the parties in regard to the first and second exceptions.

Decree accordingly.

DAVID D. HEWES vs. ASA P. RAND.

Hampden. Sept. 29. — Oct. 25, 1880. COLT & MORTON, JJ., absent.

A composition in bankruptcy, under the U. S. St. of June 22, 1874, § 17, does not bind a creditor, whose debt is stated at less than its true amount in the statement of the debtor, if the creditor does not join in the resolution of composition, or accept any money under it, and objects to its being recorded.

Land was leased by a trustee, and the lessee covenanted with him to pay rent and taxes. The trustee directed the lessee to pay the rent to the *cestui que trust*. The lessee subsequently went into bankruptcy, and entered into a composition with his creditors under the U. S. St. of June 22, 1874, § 17. His schedule of debts stated the amount due for rent, and the name and address of the *cestui que trust*, but not the amount due for taxes, nor the name and address of the trustee. Neither the trustee nor the *cestui que trust* took any part in the proceedings for composition. *Held*, in an action by the trustee for the rent and taxes due at the time of the bankruptcy, that the composition was not a bar.

CONTRACT upon an account annexed for work and materials. Writ dated December 7, 1875. Answer, a general denial, with a suggestion of the bankruptcy of the defendant. At October term 1879, the defendant was allowed to file a supplemental answer, setting up a composition in bankruptcy. The case had been referred to an auditor, who found that there was due

the plaintiff \$1030.60, with interest from the date of the writ, \$204.12, and that there was due the defendant, upon a declaration in set-off, the sum of \$252.29, leaving a balance due the plaintiff of \$981.93.

At the trial in the Superior Court, before *Pitman, J.*, without a jury, the plaintiff put in evidence the auditor's report. The defendant introduced the record of the District Court of the United States for the District of Massachusetts, by which it appeared that, after the bringing of the plaintiff's action, he was adjudged a bankrupt upon a petition filed May 4, 1876; that an assignee was appointed, and that subsequently, at a meeting duly held, to see whether the defendant's creditors would accept the terms of a resolution of composition of ten per cent in settlement of their unsecured claims, a statement, purporting to show the whole of his assets and debts, and the names and addresses of the creditors, was produced by the defendant, in which the debt due the plaintiff was stated as follows: "D. D. Hewes, amount \$750, notes and unsettled account." Afterward, upon due notice to all the creditors, a hearing was had before the District Court, to inquire whether said resolution had been passed in the manner directed by the statute, at which the plaintiff appeared and objected to the recording of the resolution, and filed the following specification among others: "Because said bankrupt did not, nor did any one in his behalf, at the meeting of said creditors called for the purpose of passing said resolution, produce to said meeting a statement showing the whole of his assets and debts, and the names and addresses of the creditors to whom said debts respectively are due." Thereupon the matter was referred to the register to take testimony, and testimony was taken, but none was offered bearing upon said specification; but, in that particular, the case was left upon the record evidence previously returned to the court by the register, and upon that evidence and the testimony so taken the resolution was approved by the court, and adjudged to be for the best interest of all concerned, and ordered to be recorded; and the statement of assets and debts was ordered to be filed. It further appeared that the amounts due the several creditors of the defendant, according to his statement filed, and according to the terms of the composition, were duly paid or tendered to

them, and those which were tendered and not accepted were deposited with the register in bankruptcy. Upon representation of these facts to the District Court, the bankruptcy case was ordered dismissed, and the property in the hands of the assignee returned to the defendant. It also appeared that the plaintiff was tendered the sum of \$76.25, which he declined to receive, on the ground that it was not ten per cent of his debt.

The plaintiff contended that, because in the statement of the debtor the amount of the plaintiff's debt was stated at less than the true amount due at that time, the composition was not binding upon him. The defendant contended that, although the amount was not stated with perfect accuracy according to the subsequent finding of the auditor, it was sufficiently stated to make the composition binding upon the plaintiff; that, making proper allowance for interest, the discrepancy was only \$27.81, and that an accidental error of that amount in the statement of a claim like the plaintiff's would not defeat the composition; that the plaintiff's remedy for such an inaccuracy was in the bankruptcy court, and not upon a trial in this court. He also contended that the plaintiff, having appeared and objected to the approval and record of the resolution of composition, and having by the specification expressly put in issue the question whether the whole of the debtor's assets and debts, and the names of and addresses of all the creditors to whom such debts were due, were given in the statement presented by the debtor, was bound by the adjudication thereon, and was estopped from objecting to the composition on that ground. No evidence was offered to explain or account for the difference between the debt entered by the defendant on his statement and the real debt.

The judge, having found as a fact, upon the foregoing evidence, that the debtor did not present a true and correct statement of his debt to the plaintiff in his statement, and did not tender ten per cent of his real debt, ruled as matter of law, and without considering or attempting to determine by way of inference from the foregoing facts whether or not the misstatement as to the plaintiff's claim arose from mistake, misapprehension or otherwise, that the composition proceedings were not a bar to this action; ordered judgment for the plaintiff on the auditor's report; and reported the case for the determination of this court.

If there was no error, judgment was to be entered for the plaintiff; otherwise, a new trial to be ordered.

M. P. Knowlton, for the defendant.

M. B. Whitney, (*J. R. Dunbar* with him,) for the plaintiff.

GRAY, C. J. By the act of Congress of June 22, 1874, § 17, it is enacted that the provisions of a composition in bankruptcy, accepted by resolution of the requisite majority of the creditors, "shall be binding on all the creditors whose names and addresses and the amounts of the debts due to whom are shown in the statement of the debtor produced at the meeting at which the resolution shall have been passed, but shall not affect or prejudice the rights of any other creditors." A creditor, whose name, or the amount of whose debt, is not shown in the statement of the debtor, is not bound by the composition. If his debt is stated at less than its true amount, the composition is no more binding on him than if he is not named in the statement at all. In either case, he would not obtain under the composition a like proportion of his actual debt with the other creditors, and may sue upon his debt, as if no proceedings of composition had been had. *Pratt v. Chase*, 122 Mass. 262. *Woolsey v. Hogan*, 124 Mass. 497. *Ex parte Lang*, 5 Ch. D. 971. *Breslauer v. Brown*, 3 App. Cas. 672. *Burliner v. Royle*, 5 C. P. D. 354.

The powers conferred by the statute upon the District Court of the United States are: 1st. To "inquire whether such resolution has been passed in the manner directed by this section," and whether "it is for the best interest of all concerned," and, if so, to order the resolution to be recorded, and the statement of assets and debts to be filed. 2d. To enforce "the provisions of any composition, made in pursuance of this section," in a summary manner. 3d. If it shall at any time appear that the composition "cannot, in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor," to refuse to accept and confirm the composition, or to set it aside. That court may doubtless inquire (as it appears to have done in this case) whether the debtor has filed a statement of assets and debts. And if the debtor, pending the proceedings for a composition, discovers a mistake in his statement, the statute provides that "any mistake

made inadvertently by a debtor in the statement of his debts may be corrected upon reasonable notice, and with the consent of a general meeting of his creditors." But if the statement of the debtor, as originally filed, or as thus amended, does not truly state the debt of a particular creditor, no action of the court in bankruptcy can give the composition an effect against him which the act of Congress expressly declares that it shall not have.

The only decision cited by the defendant which supports his position is one of the City Court of Brooklyn. *Beebee v. Pyle*, 1 Abbott N. C. 412. In *Becket's case*, 2 Woods, 173, no question of the effect of a mistake in the statement of a debt was presented or considered. In *Paret v. Ticknor*, 4 Dill. 111, the decision was that the debtor's statement that a particular debt upon his schedule was fully secured was not binding upon the creditor, but that the latter was entitled under the composition to the same proportion as the other creditors of so much of his debt as the security did not satisfy. In *Farwell v. Raddin*, ante, 7, the error alleged was not a mistake in the amount of the plaintiff's debt, but a fraudulent suppression of assets, which would affect all creditors alike, and as to which the act of Congress makes no specific provision.

In *Ex parte Trafton*, 2 Lowell, 505, the point decided was that a debtor might dispute the validity and amount of a claim entered upon his statement, and have the true amount ascertained under the direction of the court in bankruptcy, and satisfy the claim by paying to the creditor the proportion, stipulated by the composition, of the amount so ascertained. That decision appears to be inconsistent with the later judgments of the Court of Appeal in *Melhado v. Watson*, 2 C. P. D. 281, and of the House of Lords in *Breslauer v. Brown*, 3 App. Cas. 672. And Judge Lowell, while intimating an opinion that a mistake, without fraud, in the statement of a particular debt, would not vitiate the composition, guardedly added that, if the creditor failed to come in and prove the true amount, it would be for the State courts to say whether he was bound by the composition.

In the case at bar, the actual amount of the plaintiff's debt, without interest, and deducting the defendant's claim in set-off,

is found to have been more by \$27.81 than the amount as stated by the debtor; and the plaintiff, not appearing to have joined in the resolution for a composition, nor to have accepted any money under it, but having objected to its being recorded, is not bound by it. *Ex parte Lang*, and other cases before cited. It was therefore rightly ruled in the Superior Court that there must be

*Judgment for the plaintiff.**

* A similar decision was made in Suffolk, November 26, 1880, in the case of

WILLIAM MACMAHON, trustee, vs. DAVID H. JACOBS.

CONTRACT to recover \$125 for rent and \$225 for taxes under an indenture of lease, by which the plaintiff, "trustee for Mrs. Mary S. Israel," leased to David H. Jacobs and Henry A. Holbrook a house and land in Boston for twenty years from March 15, 1873, and they covenanted to pay him rent and taxes. The defendant Jacobs alone appeared and answered, setting up a composition in bankruptcy under the act of Congress of June 22, 1874, § 17.

At the trial in the Superior Court, before *Pitman*, J., without a jury, the following facts were admitted: The plaintiff was the son-in-law of and trustee for Mary S. Israel, who lived at Portsmouth in the State of New Hampshire and as such trustee held the title of the estate, and made the lease, and she assented to the lease by this writing thereon: "Boston, March 15, 1873. I, Mary S. Israel, named in the foregoing lease, hereby assent to and ratify and confirm the said lease, and bind myself and my heirs, appointees by will, and assigns, thereto. Mary S. Israel." On December 12, 1874, the plaintiff, by a written order addressed to the defendants, requested them to pay the rent to become due "to Mary S. Israel until further order from me, and her receipts to you for all rents of said house and estate shall be your discharge and acquittance of all the same, the same as if signed by me." The defendants afterwards paid rents as they became due to Mary S. Israel, taking her receipts therefor.

On April 17, 1878, the date of the filing of the defendant's petition in bankruptcy, the sums sued for were due under the lease and unpaid; and the defendants owed no other sum to the plaintiff or to Mary S. Israel. The proceedings in bankruptcy and in composition were in regular form. On the defendant's schedule of debts, the plaintiff's name did not appear, but the following entry was made under proper headings: "Mary S. Israel, Portsmouth, N. H. \$125." She received notice of the issuing of the warrant in bankruptcy, containing a list of the defendant's creditors, their addresses and the amount due to each, stated as aforesaid, and also containing a notice of the first meeting of creditors; and sent the notice to the plaintiff at his residence in Boston; but he, being away, did not receive it until after the first meeting. Neither he nor she took any part in the proceedings in

ANNORA MITCHELL vs. CITY OF WORCESTER.

Worcester. October 7, 1880. COLT & MORTON, JJ., absent.

If the notice required by the St. of 1877, c. 234, to be given to a city or town in case of an injury by a defect in a highway, is not given within thirty days thereafter, the burden of proof, in an action by the person injured against the city or town, is on the plaintiff to show that he was so physically or mentally incapacitated that he could not give the notice within the thirty days either by himself or by some other person in his behalf.

TORT for personal injuries, occasioned to the plaintiff, on November 21, 1878, by a defect in a sidewalk in the defendant city. Trial in the Superior Court, before *Dewey, J.*, who reported the case for the determination of this court in substance as follows:

No notice of the injury was given to the defendant until February 13, 1879, when it was given by the plaintiff's attorney. The defendant contended that the plaintiff could not maintain this action, because she had not given the notice required by

bankruptcy or in composition, nor took any dividend under the composition; but a tender was made of the dividend on \$125.

The defendant requested the judge to rule that Mary S. Israel was the plaintiff's *cestui que trust* and agent, and a party, by way of ratification, to the lease; that, if the plaintiff had actual notice of the proceedings in bankruptcy, saw the notice sent to her, and understood that the debt stated in the schedule or notice was intended to mean the debt now sued for, the composition was a bar; and that her name and address and the amount due to her were, so far as this action was concerned, the name and address of, and the amount due to, the plaintiff, and were sufficiently stated in the notice and in the schedule produced at the meeting of creditors at which the resolution of composition was passed, and that he was bound thereby. But the judge refused so to rule, and found for the plaintiff; and the defendant alleged exceptions to the refusal so to rule.

G. A. James & C. A. Prince, for the defendant.

J. B. Richardson & E. B. Hale, for the plaintiff.

GRAY, C. J. The debt sued on was due to the plaintiff, not to his *cestui que trust*. He never authorized her to receive or discharge any part of the claim for taxes, nor to discharge any part of the rent without actual payment. Neither the sum due for taxes, nor the plaintiff's name and address, were upon the debtor's schedule. The plaintiff having taken no part in the proceedings, the composition in bankruptcy is no bar to this action. *Hewes v. Rand*, *supra*, and cases cited.

Exceptions overruled.

statute. The judge ruled that, when notice is not given until after thirty days from the time of the accident, the burden of proof is on the plaintiff to show that the omission to give the notice was on account of physical or mental incapacity to give it.

Evidence was introduced as to the plaintiff's physical and mental capacity during and after said thirty days. The judge ruled that if the jury found that the plaintiff was not so incapacitated either physically or mentally but that she might have given the notice required by statute, through some other person, within the thirty days after the accident, though she was not able to go personally and give it, on account of physical inability, and she did not give nor cause any notice to be given until after the thirty days, she could not maintain this action.

The jury returned a verdict for the defendant. If the rulings were erroneous, the verdict was to be set aside and a new trial ordered; otherwise, judgment on the verdict.

W. A. Gile, for the plaintiff.

F. T. Blackmer, for the defendant, was not called upon.

GRAY, C. J. The rulings at the trial were correct. The notice required by the St. of 1877, c. 234, §§ 3, 4, before bringing an action for an injury occasioned by a defect in a highway, may be given by the person injured, or by any other person in his behalf; and, if the person injured is neither physically nor mentally incapacitated to give such notice himself or through another person, is a condition precedent to the right of action. *Kenady v. Lawrence*, 128 Mass. 318. *Gay v. Cambridge*, 128 Mass. 387. *Larkin v. Boston*, 128 Mass. 521. The case at bar does not present the question what might be the effect if the person injured continued to be so incapacitated for two years after the injury.

Judgment on the verdict.

LYMAN COOK vs. ALMIRA W. HORTON.

Worcester. October 12, 1880. COLT & MORTON, JJ., absent.

No appeal lies to this court, under the Gen. Sts. c. 117, § 8, from a decree of the Probate Court, ordering that the account of an administrator be not allowed because he has not charged himself with the amount due on a certain mortgage, but not ascertaining that amount, nor settling the account.

APPEAL by an administrator from a decree of the Probate Court, by which, after his final account, showing a balance in his hands of \$319.75, had been presented for allowance, and had been objected to by one of the heirs at law because the administrator had failed to collect the amount of \$1952.50 and interest, due at the time of the death of the intestate, and secured by a mortgage held and owned by him at that time, it was decreed that the account "be not allowed and recorded, because the administrator has not charged himself with the amount due upon a certain mortgage as set forth in the specification of Almira W. Horton, one of the heirs at law, filed in this case; but the amount due on said mortgage is not found, as neither of the parties desires that it should be."

The case was submitted upon a statement of facts to Ames, J., who ordered that the decree of the Probate Court should be affirmed, and that the administrator account for the amount, if any, due on the mortgage, and that the case be referred to a master to ascertain that amount and report it to the court; but, being of opinion that this order so affected the merits of the controversy that the matter of the liability of the administrator, and other questions of law as to the amount thereof, arising on the facts agreed, ought to be determined by the full court before any further proceedings, reported those questions for that purpose.

S. H. Tyng, for the appellant.

T. G. Kent, for the appellee.

GRAY, C. J. The accounts of executors and administrators must be settled in the first instance in the Probate Court, and, until that court has made a decree for the settlement of an account, no appeal lies to this court. Gen. Sts. c. 98; c. 117, §§ 8, 16. *Demmon v. Green*, 5 Dane Ab. 266. The Probate Court

has made no decree for the settlement of the account of the appellant, either as presented, or as modified by charging him with the amount due on the mortgage. Its decree resembles a judgment rendered by the Superior Court for a plaintiff, without ascertaining the amount which he shall recover; in which case no appeal lies to this court. *Riley v. Farnsworth*, 116 Mass. 223. The decree of the justice of this court, affirming the decree of the Probate Court, and referring the case to a master, must therefore be set aside, and the appeal from the Probate Court

Dismissed for want of jurisdiction.

NORTH BRIDGEWATER SAVINGS BANK *vs.* OAKES S. SOULE.

Plymouth. Jan. 29. — Oct. 22, 1880. MORTON & SOULE, JJ., absent.

In an action by a savings bank against the surety on a promissory note, to which the defence was payment, there was evidence that the treasurer of the plaintiff bank, who was the officer in charge of its business, and the defendant were joint sureties on another note, which had been paid by the defendant, and which was signed by the same principal as the note in suit; that, on the bankruptcy of this principal, an agreement was entered into by the treasurer and the defendant, by which the treasurer should pay the note held by the bank, and the defendant should deliver to the treasurer the note paid by him, and pay the treasurer whatever on a final settlement should be found to be due; that the note held by the bank was delivered by the treasurer to the defendant, and proved by him as a claim against the estate of the bankrupt, and the treasurer proved the other note as a claim held by him against the same estate, and stated to the register that the bank had received payment on the note formerly held by it. It was admitted that the note in suit was not in fact paid by the treasurer, and there was evidence that, on the death of the treasurer, the note was found with the other securities of the bank. *Held*, that this evidence constituted no defence to the action.

The St. of 1878, c. 261, allowing a person indebted to a savings bank, in a proceeding for the collection of the debt, to set off the amount of a deposit held, and owned by him at the commencement of such proceeding, is constitutional.

An assignee of a deposit in a savings bank can set off the same, under the St. of 1878, c. 261, against a claim of the bank, without a previous notice to the bank of the assignment.

CONTRACT on four promissory notes, the first of which was for \$3000, and was signed by the defendant as principal, and the rest were signed by him as surety for the firm of Porter &

Southworth. Writ dated November 30, 1877. Answer, payment. The defendant also filed a declaration in set-off, alleging that on March 28, 1877, one Patrick Fitzgerald had a deposit in the plaintiff bank of \$1080, with interest and dividends thereon; that, on that day, Fitzgerald, for a valuable consideration, assigned the deposit to the defendant; and that before proceedings in equity to restrain the plaintiff from doing its usual business, the defendant held and owned said deposit.

Trial in this court, before *Lord, J.*, who reported the case for the consideration of the full court, in substance as follows:

The defendant admitted his liability upon the first note; and offered evidence tending to prove that the other notes were signed by him for the accommodation of Porter & Southworth, a firm consisting of Lewis Porter, the son-in-law of the defendant, and George Southworth, the son of Edward Southworth; that Edward Southworth was, and had been for many years, the treasurer of the plaintiff bank, and was the only officer attending to its business; that, at some time in 1875, the firm of Porter & Southworth failed; and at the time of their failure the defendant and Edward Southworth were jointly liable, as sureties on a note for \$3000, given for the accommodation of Porter & Southworth, and held by the Randolph National Bank; that the defendant paid this note; that the firm of Porter & Southworth went into bankruptcy, and a meeting of their creditors was held in September 1875, before a register in bankruptcy; that on the day of this meeting, and prior thereto, the defendant went to the plaintiff bank, and there saw Edward Southworth, and stated to him that he was advised that he had no right to prove the notes held by the bank against Porter & Southworth, unless he had paid the same, but that it was inconvenient for him to pay them that day, and that, if Southworth would pay them, he would transfer to him the note paid by the defendant at the Randolph Bank, and would pay him afterwards whatever amount the defendant on final settlement should owe him; that Southworth agreed to do this, and subsequently came to the creditors' meeting, and delivered the three notes to the defendant, stating that he had paid the same, and the defendant thereupon delivered to him the note paid by the defendant at the Randolph Bank; that Southworth made proof

of the note for \$8000, as a debt due himself, and the defendant made proof of the three notes as a debt due to himself, which proofs were made in the presence of the defendant and Southworth respectively; that the defendant never consented to the notes in suit being taken from the office of the register, and had no knowledge that they had been so taken until this action was brought.

Rufus P. Kingman, one of the receivers of the plaintiff bank, testified that shortly after the decease of Edward Southworth, in March 1877, he examined the papers and securities of the bank, and found the three notes in question in the regular place of deposit of personal securities due to said bank. No question arose that the notes were received by the defendant in good faith, and with the belief that the title of the bank to the same was passed to him, and with the belief that Southworth had paid them at the bank.

The defendant further offered to prove that, at the creditors' meeting, the register inquired of Southworth whether the bank had been paid for the notes, and that Southworth replied that it had been. The court excluded this evidence, against the defendant's objection.

The defendant admitted that Southworth had not paid the bank for these notes.

In support of the claim in set-off, the defendant proved the facts therein set up. It appeared that the proceedings to restrain the bank from doing business were brought in November 1877; and that no notice of the assignment was ever given to the bank.

If there was any question of fact to be submitted to a jury, the case was to be so submitted; otherwise, such judgment to be entered as to the court should seem proper.

E. Ames, (J. White with him,) for the plaintiff.

R. M. Morse, Jr., for the defendant.

LORD, J. The first question presented is as to the liability of the defendant on the three notes signed by him as surety for the firm of Porter & Southworth. The defendant contends that the plaintiff bank is bound by the action of its treasurer, and is estopped to deny that the notes have been paid to the bank, or that the defendant now lawfully holds them.

This depends upon the decision of several different questions ; for if, in point of fact or by operation of law, these notes were paid, then they are discharged, not by way of estoppel, but by satisfaction. If, upon the other hand, they have not been paid, but the legal custodian of them had accepted from the maker something which he had the right to accept in lieu of payment, and had actually delivered the notes to the defendant as paid, and this was done in a course of proceeding authorized by the plaintiff, or subsequently ratified by the plaintiff, the plaintiff would be estopped from denying the payment. If the settlement were made without the plaintiff's authority, and by it any property of value came into possession of the plaintiff, or the defendant was put in a worse situation than before, the plaintiff could not disaffirm the contract, without repaying to the defendant the money paid by him, or restoring him to his former condition.

A careful examination of the facts as reported does not disclose either of these conditions. In point of fact, the notes were not paid. The evidence reported would not have warranted a jury in finding that the defendant changed his condition to his prejudice. The arrangement was apparently a personal arrangement between himself and Edward Southworth. It does not appear that either of them understood that his own liabilities upon the various contracts were in any manner to be affected ; but, on the other hand, their respective liabilities were to remain the same, except that, in the subsequent settlement between the defendant and Edward Southworth, Southworth was to be permitted to set off his liability for contribution on the note held by the Randolph National Bank against his claim against the defendant upon the disputed notes. If this arrangement had been actually consummated, a different question would have been presented. As it is, the whole agreement was executory, and still remains so. The delivery of the notes in suit to the defendant was merely for the purpose of enabling him to prove them in bankruptcy, and not for the purpose of discharging the defendant from his liability upon them ; that was to remain. The giving up to Southworth the note which the defendant paid at the Randolph Bank did not discharge Southworth's liability to the defendant upon such note, and was

not understood by either of the parties to be such discharge, but the full amount of his liability was to remain and be accounted for between the parties. The mere fact that the defendant did not know that the notes had been taken from the register's office is a wholly immaterial fact, and can in no mode affect any one's title to them.

If we could see that from any or all these facts a jury would be warranted in finding a discharge of the defendant, in law or in fact, by reason of payment or by estoppel, or if we could see any evidence of fraud upon the part of the plaintiff or its authorized agent, such as would relieve the defendant from his liability upon the notes, we should direct the case to stand for trial, so far as those notes are concerned. But, seeing nothing which would warrant a jury in finding the defendant to be discharged, we think the plaintiff is entitled to judgment upon them.

The only remaining question is whether the defendant is entitled to set off the deposit in the plaintiff bank assigned to him by Patrick Fitzgerald in March 1877. This claim for set-off is made under the St. of 1878, c. 261, which enacts that "any person indebted to a savings bank in this Commonwealth, whether his indebtedness is secured or not, may in any proceeding for the collection thereof, or for the enforcement of any security therefor, set off the amount of any deposit in said bank held and owned by him at the time of the commencement of such proceeding, and of the interest due thereon: provided, however, that this act shall not authorize the set-off of any deposit purchased or acquired from another after the commencement of proceedings in equity to restrain such bank from doing its usual business, or after the issuing of an order under the provisions of chapter seventy-three of the acts of the year eighteen hundred and seventy-eight."

It is not contended by the plaintiff that the interest of the defendant in the deposit in question is not included under the words "held and owned by him," in the St. of 1878, c. 261; and a consideration of the proviso, by which a particular class of assignments is excluded from the operation of the statute, shows very clearly that the Legislature regarded the words "held and owned by him" as including an ownership acquired by assignment. The objections urged by the plaintiff are two: first, that

the defendant, in order to maintain his claim, ought to have given notice to the bank of his acquisition of Fitzgerald's deposit; and, second, that the St. of 1878, *c.* 261, is unconstitutional.

The latter of these objections is first to be considered, for, if it be sustained, the whole proceeding for set-off falls to the ground.

No argument is made upon the question, and the making of the objection appears to have followed a suggestion coming from the attorney general's office to the receivers of the North Bridgewater Savings Bank, in May 1878, that there were grave doubts as to the constitutionality of the law as applied to insolvent savings banks. In what respect the grave doubts have arisen is left quite indefinite.

On a careful consideration of the statute, we have been unable to perceive in it any element of unconstitutionality. The only ground on which an apparent objection to the statute might rest is the fact that a creditor of the bank, who is also a debtor of it, is entitled, in the case of the insolvency of the bank, to recover, up to the limit of his indebtedness to the bank, a larger proportion of his claim against the bank than one who is merely a creditor. But such an objection is only an apparent one. Upon examination, the provision of the statute in this regard is found to be really an equitable provision. The right of set-off is originally an equitable right, and is based upon equitable principles. It is obvious that, at any time before the commencement of proceedings in equity to restrain a bank from doing business, or before the issuing of an order under the St. of 1878, *c.* 73, the amount equitably due to the bank from any debtor of the bank who was also a creditor would be simply the balance of his debt, after deducting all credits due him from the bank. If, as the result of such proceedings or order, the demand of the debtor against the bank were to be reduced while his debt remained unchanged, it would follow that by the insolvency of the bank his equitable indebtedness to the bank would be increased. It was to remedy such a liability that the statute was passed; and its provisions are similar in effect to those of the insolvent law, which permit demands against the insolvent debtor to be set off in actions by the assignee in insolvency, unless they have been acquired within six months, and with

reasonable cause to believe the debtor insolvent. Gen. Sts. c. 118, § 48. The limitation of six months was in this case deemed by the Legislature unnecessary, perhaps on account of the improbability of speculation upon the approaching insolvency of a savings bank, and the restriction in the St. of 1878, c. 261, is laid only upon claims acquired after proceedings actually begun or order issued.

As to the want of notice, there is nothing in the statute that requires notice as between the parties. If the right of set-off had been given subject to the provisions of the Gen. Sts. c. 130, or any part thereof, the question would be a different one; but we are clearly of opinion that, to maintain a set-off under this statute, no notice of assignment to the bank is necessary. The amount of the deposit assigned to the defendant by Patrick Fitzgerald, and of the interest due thereon, must therefore be set off against the amount due from the defendant.

Judgment accordingly.

EMELINE P. PIEROE vs. CITY OF NEW BEDFORD.

Bristol. October 26. — 27, 1880. AMES & ENDICOTT, JJ., absent.

A boy coasting upon a hand-sled is not a defect or want of repair in a highway, for which a city is liable to a person struck by the moving sled.

TORT. The declaration alleged that there were in the city of New Bedford two public streets, called Pearl Street and Purchase Street, which crossed each other at right angles, and which the city was bound to keep in repair and reasonably safe and convenient for travellers with their horses, teams and carriages at all seasons of the year; that for several days previous to January 11, 1879, boys had been and were in the habit of coasting and sliding with sleds upon Pearl Street, without hindrance or interruption from the authorities of the city; that the policemen on duty in that part of the city had knowledge of the coasting and sliding; that while the plaintiff, on the day above named, was travelling and riding along Purchase Street and crossing Pearl Street, using due care, a boy or boys, coasting and sliding

on Pearl Street, ran into and violently against the carriage of the plaintiff, throwing her out upon the ground and seriously injuring her; that by c. 26, § 16, of the city ordinances, "no person shall play at ball or fly a kite, raise or inflate a balloon, coast or slide down hill upon the snow or ice on a sled or other vehicle, use a bow and arrow, throw or propel in any manner stones, snowballs or other missiles, or play at any game or do any act by which the streets, ways or sidewalks may be obstructed, or the passengers incommoded or exposed to injury;" and that the city had due and proper notice, under the statute, of the time, place and cause of said injury.

The defendant demurred to the declaration, on the ground that it set forth no cause of action; the Superior Court sustained the demurrer; and the plaintiff appealed to this court.

W. C. Parker, Jr., for the plaintiff.

F. A. Milliken, for the defendant, was not called upon.

BY THE COURT. The declaration shows no cause of action against the defendant. A boy coasting upon a hand-sled is not a defect or want of repair in the highway, for which the city is liable to a person struck by the moving sled. St. 1877, c. 234. *Vinal v. Dorchester*, 7 Gray, 421. *Shepherd v. Chelsea*, 4 Allen, 113. *Barber v. Roxbury*, 11 Allen, 318. *Hutchinson v. Concord*, 41 Vt. 271.

Judgment for the defendant.



JOSEPH C. TERRY vs. JAMES M. BRIGHTMAN & another.

Bristol. October 27. — 28, 1880. AMES & ENDICOTT, JJ., absent.

Under the St. of 1878, c. 231, § 1, a judge of the Superior Court has no power to report to this court a case heard without a jury, without making any decision in matter of law, or entering of record a finding upon the facts, equivalent to the verdict of a jury, upon which judgment may be rendered.

CONTRACT by Joseph C. Terry against James M. Brightman and William H. Clay, to recover \$3600 for the charter of the steamer *Border City*. Trial in the Superior Court, before *Pusnam*, J., who made the following report thereof:

"The case was heard by the court without a jury, and the court found the following facts: The plaintiff was the agent of the owners of said steamer, and on September 6, 1877, as such agent, entered into an indenture with the defendants for the chartering of said steamer, a copy of which indenture is annexed.* At the time of the making of this indenture, and at the time this action was brought, there were nineteen

* "This covenant, made and concluded in Fall River on the sixth day of September 1877, between the owners of the steamer Border City, Joseph C. Terry, agent, of the burthen of one hundred tons or thereabouts, now lying at Fall River, parties of the first part, and W. H. Clay of Port Orange, Florida, and J. M. Brightman of said Fall River, parties of the second part, witnesseth, that the said parties of the first part, in consideration of the covenants and agreements hereinafter mentioned to be performed by the parties of the second part, do covenant and agree on the chartering and letting of said vessel unto the parties of the second part for the term of one year from the time she is fitted and ready for use; and the said parties of the first part agree to keep said vessel in and during said term tight, stanch, well fitted and tackled, and further agree that she shall be ready for use by the fifteenth day of October next. And the parties of the second part, in consideration of the above covenants and agreements, hereby covenant and agree with the parties of the first part to charter and hire said vessel for said term of one year as aforesaid, and to pay therefor the sum of thirty-six hundred dollars in equal monthly payments, three hundred dollars on the last day of each and every month, said sum to be paid to J. C. Terry, agent, at Fall River. And the parties of the second part further agree to make all necessary repairs not otherwise provided for, and to repair all damages caused by the fault, negligence or want of care of the said parties of the second part or their servants, and to provide and furnish said vessel with everything necessary for the voyages during said term, including coal, oil, waste and provisions for the men, and to furnish captain and crew. And said parties of the second part further agree to use said vessel in carrying freight and passengers on the coast of Florida, and for no other purpose or voyage, except with the written consent of the parties of the first part or their agent. And said parties of the second part agree to pay for said vessel, at the rate aforesaid, from the time she is ready for use, whether said time shall be the fifteenth day of October next or some time previous and before said day.

"In witness whereof, we, the above-mentioned parties, hereunto set our hands and seals this fifteenth day of October 1877.

W. H. Clay. [Seal.]
J. M. Brightman. [Seal.]
J. C. Terry. [Seal.]

part-owners of said steamer. The plaintiff was the owner of two thirty-second parts, and the defendant Brightman was the owner of thirteen sixty-fourth parts. The other defendant, Clay, was not an owner. Clay was defaulted; and Brightman alone defended this suit, and contended that, upon the foregoing facts, the plaintiff could not recover in this action in his own name.

"I find upon the facts that the amount which the plaintiff is entitled to recover, if the action can be maintained, is the sum of \$1906. And now, by agreement of parties, and before the finding of the court is entered, the case is reported for the determination of the Supreme Judicial Court upon the questions of law arising upon the foregoing facts. If the action can be maintained by the plaintiff, he is entitled to recover the sum of \$1906, with interest from the date of the writ, and judgment is to be entered for him for that sum. If the plaintiff is not entitled to maintain this action, judgment is to be entered for the defendant."

J. M. Morton, Jr. & A. J. Jennings, for the plaintiff.

A. N. Lincoln, for the defendants.

GRAY, C. J. The justices of this court have long had the power of reserving and reporting, at their discretion, at any stage of the case, for the determination of the full court, questions of law arising in any trial or other proceeding, civil or criminal; and this power has been recognized in each revision of the statutes of the Commonwealth. Rev. Sts. c. 81, § 26, and note of Commissioners. Gen. Sts. c. 112, § 10; c. 113, § 15. Shaw, C. J., in *Higbee v. Bacon*, 11 Pick. 423, 428, 429.

But the Legislature has never seen fit to entrust so large a power to the judges of any inferior court, who have no share in discharging the burden thus imposed upon the full bench of this court. In criminal cases, the Court of Common Pleas and the Superior Court have been authorized to report, after conviction, and at the desire or with the consent of the defendant, important or doubtful questions of law; but neither of those courts has ever been authorized to report before conviction. St. 1882, c. 180, § 5. Rev. Sts. c. 188, § 12. Gen. Sts. c. 173, § 8. *Commonwealth v. Intoxicating Liquors*, 105 Mass. 468. *Commonwealth v. Byrnes*, 126 Mass. 248. In civil cases, the judges of the Court of Common Pleas had no authority to reserve questions

of law upon report. *Goddard v. Perkins*, 9 Gray, 411, 412. Nor had the judges of the Superior Court of the County of Suffolk. St. 1855, c. 449. Upon the establishment of the Superior Court having jurisdiction throughout the Commonwealth, the judges thereof were authorized to report such questions after verdict only; and before the St. of 1878, c. 231, they had no power to report questions of law in civil cases tried without a jury. St. 1859, c. 196, § 32. Gen. Sts. c. 115, § 6. *Lincoln v. Parsons*, 1 Allen, 388. *Bearce v. Bowker*, 115 Mass. 129. *Commonwealth v. Dowdican's Bail*, 115 Mass. 183.

The St. of 1869, c. 438, which empowered the Superior Court, by consent of the parties to the suit, to report before verdict questions of law for the determination of this court, and thus for the first time enabled the judges of a lower court to call for the advice of the court of ultimate appeal in advance, before performing their own appropriate judicial functions as the court of original jurisdiction, was found extremely inconvenient in practice, by the frequent sending up to this court of questions obscurely and imperfectly presented for want of a full trial in the court below, and which, if the case had been fully tried there, might have become immaterial to the final result.

The St. of 1878, c. 231, has made important changes in the powers of the judges of the Superior Court in two respects. By § 1, it has authorized them, "in any case where the trial is by the court without a jury, after the finding upon the facts," to report questions of law arising at the trial for the determination of this court "in like manner as if a verdict had been rendered." By § 2, it has repealed the St. of 1869, c. 438, and thus taken away the power of the Superior Court to report before verdict cases tried by a jury.

This statute clearly manifests the intention of the Legislature that cases in the Superior Court, whether tried with or without a jury, should be there decided, both upon the law and upon the facts, in the first instance, and that a verdict of the jury, or an equivalent finding of the judge, upon which judgment might be rendered, should be entered of record, before any question of law should be reported from that court to this. When the case is tried by a jury, the presiding judge must instruct them upon the questions of law applicable to the facts to be determined by

their verdict. When he tries the case without a jury, his finding upon the facts equally necessitates his passing upon the questions of law involved in that finding.

The present case having been reported to this court by the judge presiding in the Superior Court, without making any decision in matter of law, and before entering of record any such finding as is equivalent to the verdict of a jury, the

Report must be dismissed

MARY L. ROBINSON vs. JAMES B. ROBINSON.

Bristol. October 28, 1880. AMES & ENDICOTT, JJ., absent.

If the record, on which an appeal is taken from a decree of a justice of this court, affirming a decree of the Probate Court, states a fact essential to the jurisdiction of the Probate Court, the appellant cannot contend in this court that the fact is otherwise, and move to dismiss the proceeding in the Probate Court.

APPEAL by James B. Robinson from a decree of the Probate Court, assigning dower to Mary L. Robinson in lands of her husband, Francis Robinson. The petition of Mary L. Robinson alleged "that her right is not disputed by the heirs; and that the names and residences of all persons now interested therein are as follows: James B. Robinson, Attleborough. Richard Robinson, Attleborough."

The decree of the Probate Court contained this recital: "All parties interested having been duly notified and heard thereon, and it appearing that said Francis Robinson died seised of land in this State; that said Mary L. Robinson is his widow, and is deprived of the provision made for her by the will of her husband in lieu of dower, and entitled to dower therein; that her right thereto is not disputed by the heirs at law, and that the estate of said deceased is settled in this court."

From that decree James B. Robinson appealed to this court. Morton, J. affirmed the decree; and the appellant appealed to the full court, and now moved to dismiss the petition, because the right of dower was disputed by the heirs, and therefore the Probate Court had no jurisdiction.

J. Daggett, for the appellant, cited Gen. Sts. c. 90, § 3; *Henry's case*, 4 Cush. 257; *Woodward v. Lincoln*, 9 Allen, 239; *Mercier v. Chace*, 9 Allen, 242.

E. M. Reed & G. A. Adams, for the appellee, were not called upon.

BY THE COURT. The petition and the decree of the Probate Court set forth that the petitioner's right of dower is not disputed by the heirs; and there is nothing in the record before us to show that it was disputed, or even that the appellant is an heir at law. *Motion overruled, and decree affirmed.*

KATAMA LAND COMPANY vs. RICHARD HOLLEY.

Dukes County. Oct. 30, 1879. — Oct. 21, 1880. COLT & AMES, JJ., absent.

A statute enacted that four persons named "are hereby made a corporation," and fixed the capital stock at \$50,000, with liberty to increase it by vote of the corporation to \$150,000. The persons named in the statute met, organized by the choice of a chairman and clerk, accepted the act of incorporation, appointed a committee to receive subscriptions, and voted that, when subscriptions were received to the amount of \$50,000, the clerk should call a meeting of the subscribers. A subscription paper was drawn up reciting the act of incorporation, stating the capital stock to be \$50,000, that the signers associated themselves together to form said corporation, and agreed with the corporation to take the number of shares affixed to their respective names, and to pay therefor \$100 a share at such times as should be determined on the organization of the corporation. The paper was signed by a number of persons, and the number of shares set opposite their names represented nearly \$100,000. At a meeting of the subscribers, a committee appointed for the purpose reported the names of fourteen persons whose subscriptions aggregated \$50,000. These names were taken promiscuously, and not in the order of their subscriptions. By-laws were then adopted. On the motion of a subscriber, not one of the fourteen, the capital stock was increased to \$100,000; all the subscribers were admitted with the rights and privileges of stockholders; directors were chosen, and an assessment was levied on the capital stock, which was paid. At a subsequent meeting another assessment was levied. *Held*, in an action against one of the fourteen persons whose names were reported by the committee as above stated, to recover his proportion of this assessment, that the corporation was never legally organized, and that the action could not be maintained.

CONTRACT upon an agreement signed by the defendant and forty-one other persons, to recover an assessment made by the

plaintiff on twenty shares of stock standing in the name of the defendant. The parts of the agreement now material to be stated were as follows : "Whereas, by act of the Legislature of Massachusetts, in the year 1872, Erastus P. Carpenter, Joel H. Hills, Grafton N. Collins and Nathaniel M. Jernegan, their associates and successors, are created a corporation, under the name of the Katama Land Company, for the purpose of purchasing, holding, improving and disposing of land in the town of Edgartown, the capital stock of which corporation is fixed at fifty thousand dollars; now, therefore, the undersigned hereby associate themselves together to form said corporation, and severally subscribe for and agree each with the other and with said corporation to take the number of shares affixed to their respective names, and to pay therefor the sum of one hundred dollars per share, at such times as shall be determined, upon the organization of said corporation: provided, however, that the subscription shall not be binding until the whole amount of said capital stock shall have been subscribed." Opposite the defendant's name were written the words "twenty shares."

Trial in the Superior Court, without a jury, before *Putnam, J.*, who found for the defendant, and reported the case for the determination of this court, in substance as follows :

It appeared by the plaintiff's records that the persons named in the St. of 1872, c. 155,* as incorporators, organized and elected Erastus P. Carpenter chairman, and Joel H. Hills clerk, voted to accept the statute, and also passed the following vote: "On motion, it was voted that N. M. Jernegan serve as a committee

* Section 1 of this act, which took effect on March 28, 1872, enacts that "Erastus P. Carpenter, Joel H. Hills, Grafton N. Collins, Nathaniel M. Jernegan, their associates and successors, are hereby made a corporation, by the name of the Katama Land Company, for the purpose of purchasing, holding, improving and disposing of land in the town of Edgartown."

Section 3 is as follows: "The capital stock of said corporation shall be fifty thousand dollars, with liberty to increase by vote of the corporation to an amount not exceeding one hundred and fifty thousand dollars, and shall be divided into shares of one hundred dollars each, and no share shall be issued until the amount thereof has been paid in in cash: Provided, that the said corporation shall not incur any liability until at least fifteen thousand dollars in cash shall have been paid in."

to receive subscriptions for stock, in accordance with the following agreement; and when the amount shall reach the sum of fifty thousand dollars, the clerk shall call a meeting of the subscribers, giving seven days' notice of same by mail, stating place, time and business to be transacted." In the records a copy of the agreement set out in the declaration follows the record of the above vote. The next meeting was held April 29, 1872, and the material parts of the records thereof, as shown by the record book, were as follows:

"Boston, April 20, 1872. The committee (Nathaniel M. Jernegan) chosen by the corporators to solicit subscriptions of stock of the Katama Land Company, having given me verbal notice that the amount required by the act of incorporation and vote of the corporators had been subscribed, the following notice was issued to the subscribers:

"Katama Land Company. There will be a meeting of the corporators and subscribers to the capital stock of the Katama Land Co., at the Parker House, New Bedford, on Monday evening, April 29, at 7½ o'clock, for the purpose of organizing said company. 1st. To adopt a code of by-laws to govern said company. 2d. To choose necessary officers required by said by-laws. 3d. To act upon any other business legally brought before the meeting.

"Boston, April 20, 1872.

Joel H. Hills, clerk."

Following this was an acknowledgment, dated April 29, 1872, and signed by six persons, but not by the defendant, that they had received a copy of the foregoing notice, at least seven days before.

The record then showed that at a "meeting of the subscribers to the stock of the Katama Land Company," held at New Bedford on April 29, 1872, the chairman called the meeting to order, and the clerk read the records of the corporators' meeting, and it was voted that a committee of three be appointed by the chair to report the names of subscribers to the original amount of capital stock of fifty thousand dollars; that the committee reported the names of fourteen persons, among which was that of the defendant. By-laws were then adopted. On motion of Andrew G. Pierce, (who was not one of the fourteen persons selected by the committee,) it was voted to increase the capital

stock of the company from \$50,000 to \$100,000, and it was also voted that all the subscribers be now admitted to the company with the rights and privileges of stockholders under the agreement. Directors were then elected; and an assessment of fifty per cent was levied upon the capital stock.

The plaintiff produced the original subscription paper, bearing subscriptions amounting to nearly \$100,000, but offered no evidence of the genuineness of any of the signatures thereto except those of the defendant. The defendant admitted his signature to the agreement. The fourteen names reported by the committee at the meeting, whose duty it was to report the names of subscribers to the original amount of capital stock of fifty thousand dollars appeared to have been taken promiscuously from the names subscribed, and not in their regular order of subscription as they appeared under the agreement. The defendant was among the fourteen names reported. It appeared that there were no signatures added to the agreement after the vote increasing the capital stock, but all the signatures were on it at the time of the vote. It was admitted that assessments amounting to \$75 per share had been paid by the stockholders generally, including the defendant.

It further appeared that, at a meeting of the stockholders held on October 24, 1873, a further assessment of twenty-five per cent was levied upon the capital stock of the corporation, and that the defendant refused to pay the same.

Upon the foregoing facts the defendant contended that there was no evidence of any knowledge by him of the increase of capital, and no evidence of any express agreement by him to pay, and that he was not liable.

The judge found and ruled, upon the foregoing facts, that the plaintiff was not entitled to recover. If the finding was correct, judgment was to be entered for the defendant; otherwise, a new trial to be ordered.

G. A. Torrey, (J. Brown with him,) for the plaintiff.

T. M. Stetson, for the defendant.

LORD, J. The plaintiff was authorized to become a corporation by the St. of 1872, c. 155. The persons named in the act of incorporation met on April 15, 1872, elected Erastus P. Carpenter their chairman and Joel H. Hills their clerk, and voted

to accept the statute. Assuming that the passage of the act and the formal acceptance of it by those named therein constitute a corporation *de facto* and *de jure*, its powers, duties and liabilities are quite different from those of a corporation which has been organized by an election of officers, subscription to stock, payment for the same, and certificate of shares duly issued. Such a corporation undoubtedly holds the franchise by which it is authorized to receive subscriptions to its capital stock, and enforce collection of the same. But until something further is done than merely to accept the charter, it has not become the corporation contemplated by the charter, with a capital stock of \$50,000. It is clear that such was the corporation authorized by the statute, and to the stock of such a corporation they were authorized to receive subscriptions; and although that corporation, when organized and lawfully in operation, had the right by vote to increase its capital to the sum of \$150,000, yet the statute did not authorize the formation of a corporation with an original capital of \$150,000.

At the meeting at which the charter was accepted by the corporators, a committee was chosen to receive subscriptions to the stock of such corporation; that was to a corporation with authority to organize with a capital of \$50,000, and it was to the capital stock of such a corporation that the defendant subscribed; and the first and most important question to be settled is, whether such a corporation was ever organized. If organized, and the proper steps had been taken to obtain subscriptions to its capital, and proper proceedings had thereon, it might enforce the collection of such subscription by suit.

In determining the rights of this corporation, it is necessary to look into all their proceedings from the beginning. When the corporators met, April 15, 1872, they chose a committee to receive subscriptions for stock, and voted that, when the amount of the subscription should reach \$50,000, the clerk should call a meeting of the subscribers, giving seven days' notice thereof, stating time and place of meeting, and business to be transacted. On April 20, 1872, the clerk of the corporators made a record of the fact that, having received verbal notice that the amount required by the act of incorporation and vote of the corporators had been subscribed, he had issued a notice to the subscribers

calling a meeting on April 29, 1872, for the purpose of organizing the company.

Upon whom, or how, this notice was served, does not appear, except that the record showed that six subscribers acknowledged that they received such notice at least seven days before April 29. It does appear, however, that there were more than forty subscribers, and that the number of shares subscribed for exceeded nine hundred. It is quite apparent that all the subscribers were, or were intended to be, notified of the meeting; and all such subscribers took part in, or were allowed to take part in, the proceedings of the meeting.

The first action of that body of men was the selection, on motion, of a committee of three appointed by the chair, to report the names of subscribers to the original amount of the capital stock of \$50,000. That committee reported the names of fourteen persons whose aggregate subscriptions amounted to \$50,000. These names were "taken promiscuously from the names subscribed, and not in their regular order of subscription, as they appeared under the agreement."

That these fourteen persons thus selected might have met by themselves and organized a corporation with a capital of \$50,000 divided into shares of \$100 each, according to the terms of their charter, need not be questioned; nor need we discuss the question whether it would have been competent for such corporation to have increased its capital by vote at its first meeting, or whether it were necessary that a meeting should be called for that purpose. It is manifest that no such organization was made or attempted to be made by them. The record of the meeting, in its obvious signification, is the record of a meeting of all the subscribers; and all the proceedings had were the proceedings of those subscribers, and the by-laws which were adopted were adopted by that meeting of subscribers, and not by a corporation organized by the fourteen reported as original subscribers, acting by themselves as a corporation. Although this is the natural and apparently the unavoidable construction of the record, that it is the doings simply of that body of men, and not of a corporation, yet it is not left to inference or implication from the language used. The record itself makes it certain that it was a meeting of these men, and not the meeting of an organized

corporation. The motion to increase the capital stock from \$50,000 to \$100,000 was made by Andrew G. Pierce. Pierce appears to be one of the forty odd subscribers to stock, but he was not one of the fourteen. If this were a meeting of that corporation consisting of fourteen persons, it is entirely plain that Pierce had no rights there, that his presence was irregular, and the presiding officer of the corporation could not have acknowledged his presence or have received a motion from him. But the meeting being a meeting of persons sustaining a particular relation to the chartered corporation, and Pierce coming within that description and having received notice to attend the meeting, might properly attend and participate in the proceedings of the meeting while it retained its original character; and such character it is apparent that it did retain through its whole duration.

It follows from this review of the proceedings that the corporation created by the charter, with a capital stock of \$50,000 to be divided into shares of \$100 each, was never legally organized; and, not having been legally organized, no assessment could legally be made by the corporation upon the subscriptions to the capital stock of such corporation. The subscription, of itself, does not give the corporation a right to sue the subscribers to the stock. If that alone were sufficient, then, as soon as the incorporators had met and accepted the act, a right of action would have accrued against each of the forty odd subscribers for the ninety odd thousand dollars. The first step to be taken by the corporation is to show that it is the corporation which the statute created, that it has done all that was necessary to be done to fulfil the terms upon which the subscriptions were made, and that the assessment laid upon the subscribers was one which the corporation had authority to lay, and that it had been properly laid. But inasmuch as no such corporation as the statute created was ever organized, all that was done in relation to the increase of capital was irregular and void, and the corporation as it exists *de facto* has no right of action against original subscribers to its stock. *Athol Music Hall v. Carey*, 116 Mass. 471, 473.

We do not discuss the question what is the present status of the corporation, nor its relations, or the relations of those who have participated in its proceedings, to the public. We decide only this, that the plaintiff has not shown that there has been

such an express promise to it by the defendant, in the subscription paper offered in evidence, as to enable the plaintiff to recover upon it; and it is only upon such express promise to the plaintiff that the action is founded, or that the plaintiff is entitled to recover.

Judgment for the defendant.

LORENZO STEVENS vs. DEDHAM INSTITUTION FOR SAVINGS
& others.

Suffolk. March 17. — Oct. 21, 1880. AMES & LORD, JJ., absent.

The holder of a mortgage of land assigned it as security for his own promissory note. There being a breach of the condition of the mortgage and of the assignment, the assignee brought an action to foreclose the mortgage, obtained conditional judgment for the amount of the debt due from the assignor, and on an execution obtained seisin and possession of the land. After retaining possession for three years, the assignee sold the land. Held, that a bill in equity by the assignor to redeem the land, brought within twenty years from such sale, but more than twenty years after possession was obtained, could not be maintained.

BILL IN EQUITY, filed January 22, 1870, against the Dedham Institution for Savings, Otis G. Randall and Abby A. Randall, his wife, George Homes and Elizabeth C. Homes, his wife, to redeem a parcel of land in that part of Boston formerly Roxbury, from a mortgage. The case was heard by Lord, J., on the pleadings and proofs, and reserved for the consideration of the full court, upon a report, in substance as follows:

On June 21, 1845, the plaintiff, who then held a mortgage on the land, executed to him by Gilbert T. Hawes on June 9, 1845, to secure the payment of a promissory note for \$7320, payable in five years from that date, conveyed to the defendant corporation the land, and all his right, title and interest in the same, the debt secured by the above-named mortgage, and the promissory note therein set forth, to secure his own promissory note for \$3500, payable in one year from June 21, 1845.

On December 8, 1847, the defendant corporation commenced an action against Gilbert T. Hawes to foreclose his mortgage and, at May term 1848, obtained conditional judgment that

Hawes, within two months, pay or cause to be paid to the corporation the sum of \$3575.54, damages, with interest and costs taxed at \$18.50; and on July 6, 1848, took out an execution in that action against Hawes for possession of said land; and on July 22, 1848, seisin and possession, under the execution, were duly delivered to the corporation. The promissory note filed with the papers in that action, and on which the judgment was rendered, was the note of \$3500, given by the plaintiff to the corporation, and dated June 21, 1845. On May 8, 1849, the plaintiff paid James Richardson, the attorney of the corporation, the costs in said foreclosure suit. The corporation remained in possession until May 1, 1852, when it conveyed the land by a quitclaim deed to Otis G. Randall, for \$5500, taking in payment therefor \$1500 in cash, and a mortgage back for \$4000, payable in five years from said date, which mortgage the corporation afterwards assigned to Abby A. Randall, on May 2, 1859. The land has since been conveyed several times, and the title, so far as acquired by the defendant corporation, is now in Abby A. Randall. All the foregoing deeds, conveyances and mortgages were duly recorded in the registry of deeds.

The plaintiff testified that he never had any settlement with the corporation; that he never received back from the corporation his note of \$3500, nor the Hawes note of \$7820, which were given to the corporation with the conditional assignment of the Hawes mortgage; that he did not know by what process the corporation acquired possession of the land; that he supposed it had foreclosed absolutely against him; that the officers of the institution and Randall told him so; that he did not discover the exact state of facts as to their proceedings, nor his rights in the premises, until just before bringing this action.

The defendants put in evidence, against the plaintiff's objection, tending to show that the plaintiff knew of the conveyance to Randall, and acquiesced in it; and also offered in evidence entries on the books of the defendant corporation, made by a person since dead, tending to show a settlement with the plaintiff in 1852.

S. Bartlett & J. Hillis, for the plaintiff. 1. The possession of the defendant corporation began on July 22, 1848, under an attempt to foreclose the Hawes mortgage. But this foreclosure,

even if perfected, was not adverse to the plaintiff, but in his interest, and in trust for the payment of the plaintiff's debt. *Brown v. Tyler*, 8 Gray, 135. The first adverse act was on May 1, 1852, when the corporation undertook to convey to Randall. The bill to redeem was filed within twenty years from this time.

2. The Hawes note was dated June 9, 1845, and payable in five years. The foreclosure suit was brought before that note was due; and the corporation took judgment, not upon any default of interest, but for the whole amount of the mortgage debt, and filed as the basis of the judgment, not the Hawes note, but the plaintiff's note. There was therefore no proper foreclosure of the Hawes mortgage.

J. R. Bullard, (*J. R. Baker* with him,) for the defendant.

SOULE, J. The only question before us in this cause is as to the right of the plaintiff to redeem certain real estate from mortgage. He does not seek to recover the proceeds of land sold.

The defendant corporation, as assignee of the mortgage given by Hawes to the plaintiff, was entitled to institute proceedings for foreclosing the mortgage; and the judgment in the suit for foreclosure, followed by possession for three years, made the title of the corporation absolute as against the mortgagor. But, the mortgage having been assigned as collateral security for the note of the plaintiff, the foreclosure did not work a payment of that note, but left him with the right to redeem the land by paying his note so far as it had not been paid by the rents and profits of the land. The defendant corporation held the land by a title absolute as against Hawes the mortgagor, but as security merely for its debt against the plaintiff. Its interest in the land, though not in the ordinary record form of a mortgage, was in fact a mortgage interest, liable to be defeated by the payment of the plaintiff's note. The land in its hands was affected by a trust, to convert it into money and pay over any balance of the proceeds remaining after payment of the debt due from the plaintiff to him, or, if he paid the debt, to release and quitclaim the land to him. *Brown v. Tyler*, 8 Gray, 135. *Montague v. Boston & Albany Railroad*, 124 Mass. 242.

The plaintiff contends that, because this relation of mortgagor and mortgagee existed between it and the defendant corporation,

and no peaceable entry was made and evidence of it recorded, by the corporation or any other of the defendants, for the purpose of foreclosing the mortgage from the plaintiff, the title still remains a mortgage title, notwithstanding the lapse of time and the repeated conveyances. In taking and endeavoring to maintain this position, the plaintiff fails to give full effect to some of the facts of the case, and assumes that the sale of the land by the corporation had no effect on his rights in the land.

The corporation went into possession in the year 1848, under its judgment against Hawes, and the possession then obtained has been ever since maintained by it and its assigns. It was entitled to take this possession as against Hawes, as being the assignee of the mortgage made by him; and as against the plaintiff, as being his mortgagee. From the year 1848, then, for more than twenty years before the plaintiff's bill was filed, the corporation and its assigns were in possession of the premises, and, as the plaintiff insists, no payment of interest or principal was made during all this time. The note of the plaintiff to the corporation was overdue when possession was taken under the mortgage.

In this state of facts, if it be assumed that the sale of the land by the corporation did not put an end to the plaintiff's rights therein, the right to redeem is not to be favored. Equity has adopted twenty years after breach and possession taken by the mortgagee, no interest having been paid meanwhile, as the period beyond which a mortgagor will not be admitted to redeem, without special cause. *Ayres v. Waite*, 10 Cush. 72. And this rule applies between the mortgagor and his mortgagee. The plaintiff shows no special cause. It appears that he was cognizant of the proceedings of the corporation to foreclose the mortgage; and if he failed to understand the effect of those proceedings on his rights, his mistake in that regard is not one for which the holder under the mortgage is responsible, or which in any way affects its rights.

The statement which the plaintiff testified that the officers of the Institution for Savings made to him, that "they had foreclosed absolutely against him," was a statement of opinion as to the legal effect of what they had done, rather than a misstatement of facts, and, if it was erroneous, was one on which he cannot now rely as an excuse for not protecting himself in due time.

We are of opinion, therefore, that, independently of the evidence offered by the defendants to show a settlement of the whole matter by the plaintiff and the corporation in the year 1852, no case is made for the maintenance of the bill.

If that evidence were admitted, and interpreted as the defendants contend that it should be, it would be decisive against the plaintiff. It is unnecessary to inquire into its admissibility, because, if admitted, it would not affect the decision of the case.

Bill dismissed, with costs.

JACOB L. KNOWLES *vs.* CITY OF BOSTON.
PATRICK M. FLOOD *vs.* SAME.

Suffolk. March 23. — October 21, 1880.

A notice from a city treasurer, that it is his duty to enforce the payment of a tax on land by sale unless the tax is paid forthwith, is not "a notice of sale" within the Gen. Sts. c. 12, § 56.

A person paying a tax stated orally to the clerk of the treasurer of a city that he paid it under protest, and wished the clerk to make a note of it. The clerk, acting under instructions from the treasurer to make a note of all protests, written or oral, wrote upon the receipt given for the tax that it was paid under protest, and made a memorandum to that effect on the books of the treasurer. *Held*, that there was not "a protest in writing" by the person paying, within the Gen. Sts. c. 12, § 56.

THE FIRST CASE was an action of contract to recover the amount of a betterment tax assessed by the board of aldermen of the city of Boston upon the real estate of the plaintiff, on October 7, 1872, for the widening and extension of Shawmut Avenue in said city, and alleged to have been paid by the plaintiff after a protest by him in writing. Trial in the Superior Court, without a jury, before *Pitman, J.*, who found the following facts:

In September 1873, the following notice in writing was sent to the plaintiff by the treasurer of the defendant city: "Having duly made demand for the payment of the assessment made upon your estate, numbered 283 Shawmut Avenue, by the board of aldermen, for the benefit and advantage accruing to your said estate, for widening and extending of Shawmut Avenue, and the

same remaining unpaid, it becomes my duty to enforce payment by sale of your said real estate if not paid forthwith.

“ F. U. Tracy, City Treasurer.”

The plaintiff soon after went to the treasurer's office, and paid the assessment, saying to the clerk that he paid it under protest, and receiving from him the treasurer's receipt, having upon it the words “paid under protest” written by the clerk at the time of payment. The plaintiff put in evidence an account-book of the city treasurer, in which were entered payments of betterments as made from time to time, and among them an entry of this payment with the word “protest” written over and in connection with the name of the plaintiff. He also called S. A. Cushing, a former clerk of the city treasurer, who testified that the treasurer had instructed him to make a note of all protests, whether written or oral, made when taxes were paid; that pursuant to this instruction he wrote the word “protest” in said book, as above stated, at the time of payment, and the words “paid under protest” on the receipt which he returned to the plaintiff; that he did not remember any of the circumstances attending this particular payment, but he should not have written the word “protest” in the book, nor the words “paid under protest” upon the receipt, unless the party paying had protested either orally or in writing.

THE SECOND CASE differed from the first only in the fact that the plaintiff, at the time he paid the tax and told the clerk that he paid it under protest, added that he wished him to make a note of it.

In each case, the judge found for the plaintiff, and reported the case for the determination of this court; judgment to be entered accordingly, or for the defendant, as law and justice might require.

E. P. Nettleton, for the defendant.

C. K. Fay, for the plaintiffs.

SOULE, J. The assessment in each case was invalid, because made by the board of aldermen instead of by the street commissioners. *Bigelow v. Boston*, 123 Mass. 50. The assessment was merely the assessment of a local tax for a local benefit. *Harvard College v. Boston*, 104 Mass. 470. *Prince v. Boston*, 111 Mass. 226. The amount paid cannot, however, be recovered

back, unless it appears that it was paid after a notice of a sale of the real estate, or a protest by the person paying in writing. Gen. Sts. c. 12, § 56. The plaintiffs recognize this; and it is alleged in the declaration in each action, that the payment was made after a protest by the plaintiff in writing.

It is not alleged, and the evidence offered did not tend to show, that the payment in either case was made after a notice of a sale of the real estate. The statute provides that, when the collector undertakes to levy a tax by sale of the land on which it is assessed, he shall give notice of the time and place of the sale by an advertisement thereof three weeks successively in some newspaper of the county where the estate lies, if there is such newspaper, and if not, then in a newspaper printed in an adjacent county, such advertisement to contain a substantially accurate description of the rights, lots or divisions of the estate to be sold, the amount of the tax on each, the names of all owners known to the collector, and the taxes assessed on their respective lands; and that he shall post, three weeks before the sale, a like notice in some public place in his precinct, and a like notice on the premises advertised to be sold. Gen. Sts. c. 12, §§ 28, 29, 30. The provision in § 56 that no tax paid to a collector shall be recovered back unless paid after a notice of sale of real estate, refers to the notice thus required to be given before a sale can be lawfully made, the giving of which is the beginning of proceedings for enforcing the payment of the tax. No such notices of sale of the estate of the plaintiffs had been given before they paid their assessments. The paper sent to them was merely a warning from the collector that, unless they paid, it would be his duty to proceed to sell.

The evidence also failed to show that either of the plaintiffs made a protest in writing. The plaintiff Knowles did nothing but make an oral declaration that he paid under protest. The plaintiff Flood made a like oral declaration, and added to it a request to the clerk of the city treasurer to make a note of it. This request did not change the character of the act of Flood, but left his protest a mere oral one, up to this point. It is contended, however, that the protests became written ones by virtue of what the treasurer's clerk did, in writing the word "protest" in his book, and in writing the words "paid under

protest" on the receipts which he returned to the plaintiffs. These acts of the clerk cannot avail the plaintiffs. He did not act in behalf of the plaintiffs in doing them. He was merely obeying the instructions of his employer to make a note of all protests, oral as well as written. He could not waive the right of the defendant to keep the taxes paid to it, without a protest in writing; and a memorandum made on his book, as a part of his duty to his employer, is not an act, or a writing, or a protest, by the plaintiff. The statement on the receipts is his statement, and not the statement of the plaintiffs, and does not purport to declare that the payment was made after a protest in writing; and, if it did, would not estop the defendant to show that it was not true.

Judgment for the defendant.

AARON R. COOLIDGE & another vs. ELIZA A. SMITH.

Suffolk. March 10; October 21.—22, 1880.

A deed, containing a recital that the land therein described was subject to a mortgage "which the grantee assumes and agrees to pay," was executed to a woman as grantee, without her knowledge or authority, by the direction of her husband, and was by him recorded. She never saw the deed and knew nothing of its contents until after the land was sold by the mortgagee, when she repudiated the deed. Soon after the deed was recorded, she knew that the land had been conveyed to her, and claimed to be the owner of it. *Held*, that these facts would warrant a finding that she had assented to the purchase, and a ruling that she was bound by the recital in the deed.

CONTRACT for breach of an agreement to pay a mortgage existing upon a parcel of land conveyed by the plaintiffs to the defendant. Trial in the Superior Court, without a jury, before *Pitman, J.*, who reported the case for the determination of this court, in substance as follows:

On May 18, 1872, the plaintiffs, who owned a large tract of vacant land in Dedham, mortgaged it to Martha C. Bullard, trustee, to secure their note of even date for \$6000, payable in five years. On March 18, 1876, the plaintiffs made an oral agreement with Timothy H. Smith, the defendant's husband, to exchange said land, subject to the mortgage, for an estate owned

by Timothy, situated in Boston, also subject to a mortgage. By the direction of Timothy, the deed from the plaintiffs was made to the defendant, and contained the following recital: "Subject to a mortgage of \$6000, which the grantee hereby agrees to assume and pay, and save the grantors harmless therefrom." The deed was executed, and was delivered by the plaintiffs to Timothy, who had the same recorded on March 22, 1876. In June 1878, the mortgage note to Bullard being unpaid, she caused the land to be sold by auction, under the power contained in the mortgage, and it brought \$1500, which she indorsed on the note; and, before the commencement of this action, the plaintiffs paid her the balance of the note and interest.

There was also evidence that the defendant went with her husband to the land in Dedham before or after the making of the deed to her; and that, after the date of the deed, she went alone to the mortgagee's house, and paid the interest due May 18, 1876, saying that she had purchased the property and had come to pay the interest on the mortgage.

The evidence of the defendant and her husband tended to contradict so much of the plaintiff's evidence as related to the defendant's statements at the mortgagee's house and the payment of the interest money; and they testified that the defendant did not know the deed was made to her until the commencement of this action. There was also other evidence.

Upon all the evidence in the case, the judge did not find it proved that the defendant ever knew anything about the contract of exchange or contract of purchase of the land in Dedham, or that she had ever previously authorized it, or previously thereto had authorized the conveyance or deed to be made to her, or that she ever saw the deed or copy or record of it, or had any knowledge or notice of it or of its contents or of the implied promise to pay the mortgage, until after the estate had been sold by Mrs. Bullard, when she repudiated it; nor that her husband had express or implied authority to bind her in the premises; but found that, soon after the deed was recorded, the defendant knew that the land in question was conveyed to her; that, from her knowledge and experience in such matters, she must have known that the conveyance was by deed duly recorded; that, thereupon, she claimed to be the owner thereof

and, upon these facts, held that he was authorized to find her assent to the purchase, and did so find; and further held that such conduct amounted to a ratification of the act of her husband in purchasing the estate in her name and taking the deed accordingly; and that she was bound thereby by all the agreements in the deed, although she had not examined the same or been informed as to the contents; and thereupon ordered judgment for the plaintiffs for the sum of \$5507.84. If, upon the facts found, the judge was not authorized, in law, to find ratification and acceptance of the deed so as to make the defendant liable, a new trial was to be had, otherwise, judgment to stand.

After the case was entered in this court, the judge was allowed, on motion of the plaintiff, to amend the report by adding the following statement: "At the hearing, there was evidence tending to show that, on the day the deed from the plaintiffs to the defendant was executed and delivered, and in the same office, one Richardson, at the request of Timothy, assigned to the defendant a mortgage on real estate in Revere, given by Timothy to Richardson to secure his note for \$20,000, payable to Richardson; that the assignment, after it was executed and delivered to Timothy, was duly recorded; and the defendant testified that, at the time of the trial, she owned said mortgage under the assignment; that, before and after the date of the deed from the plaintiffs to the defendant, and at the time of the trial of this case, she was the owner of certain parcels of real estate and mortgages on real estate in the counties of Suffolk and Essex, which had come to her through the agency or by the procurement of her husband; that she had, at one or more auction sales, made under powers contained in mortgages given by her husband to sundry persons, become the purchaser of the estates sold; and that, in all these cases, her husband had acted for her, but without any general or special written power." The judge further added that this statement was not inserted in the original report, because his finding was not based thereon.

N. B. Bryant, for the defendant.

N. Morse, (*C. S. Lincoln* with him,) for the plaintiffs.

AMES, J. The judge who presided at the trial in the court below was in a position in which he was required to exercise the

functions of both judge and jury. His conclusions as to the weight and sufficiency of the evidence, and the credit which he ought to give to the witnesses, are binding upon us, and are not open to revision. *Forayth v. Hooper*, 11 Allen, 419. If there was any evidence which could properly have been submitted to a jury, and upon which, if believed by them, they could legally find a verdict for the plaintiffs, the verdict could not be set aside as a matter of law. *Heywood v. Stiles*, 124 Mass. 275. The finding of the judge in this case stands in the same position as if it had been the verdict of a jury.

There can be no doubt that, if the defendant had personally conducted the negotiation and made the purchase, the provision contained in the deed, that the premises were "subject to a mortgage of six thousand dollars which the grantee assumes and agrees to pay, and save the grantor harmless therefrom," would have rendered her liable for any sums of money which the plaintiffs were obliged to pay on account of the mortgage debt. *Fiske v. Tolman*, 124 Mass. 254. But the purchase was not made by the defendant personally. The negotiation was conducted by her husband in her absence, and it was by his direction that her name was inserted in the deed as the grantee. It appears from the report that the judge did not find it proved that she had given him any previous authority to make the purchase, or to cause the deed to be made to her, or that she ever saw the deed or any copy of it, or had any knowledge or notice of it, or of its contents, or of the implied promise to pay the mortgage, until after the foreclosure sale, when she repudiated it. The report also sets forth that it was not proved that she ever knew anything about the contract of exchange or purchase of the land; but, as it goes on to say that, soon after the deed was recorded, she knew that the land was conveyed to her by deed duly recorded, we must reconcile this seemingly contradictory language of the report, by interpreting it as meaning that she did not know of the transaction until after it was completed.

Upon the assumption that her husband had no express or implied authority to bind her in the premises, we come to the question, Was the court authorized, as a matter of law, upon the facts reported, to find such a ratification and acceptance of the

deed as to make her liable upon the agreement implied in its acceptance? It is one of the facts found at the trial, that she knew that the property had been conveyed to herself by a deed duly recorded, and that, inasmuch as she did not make the bargain herself, she knew that it had been made in her behalf by some person as her agent. There was evidence, received without objection, that her husband had in several transactions acted as her agent with her consent. Soon after the deed in this case was put on record, she claimed to be the owner of the property, and there was evidence tending to show, not only that she knew the existence of the mortgage, but had paid interest upon the mortgage debt. It is not suggested that the deed was concealed from her, or that any misrepresentation as to its terms was practised, or that she had not ample opportunity to inform herself as to its contents. The fact that the property had been conveyed to her was brought to her knowledge more than two years before there was any disavowal on her part. It is impossible to say, upon these facts, that there was no evidence which would authorize the judge to find that the defendant ratified and accepted the deed. Story on Agency, § 253.

It is true that a contract made by one person as agent for another, without any antecedent authority, cannot be made binding upon the alleged principal by his ratification, unless that ratification is given upon a full knowledge of all the circumstances of the case. Story on Agency, § 239. *Dickinson v. Conway*, 12 Allen, 487. *Combs v. Scott*, 12 Allen, 493. But it is equally well settled that the principal cannot, of his own mere authority, ratify the transaction in part, and repudiate it as to the rest. He must either adopt the whole or none. Story on Agency, § 250. It was impossible, therefore, for the defendant to accept the deed, and claim title under it, and to allow so long a time to elapse before any repudiation of it, without at the same time accepting the terms of the deed and the nature of the title which it purported to give. A party must be presumed to know the contents and true meaning of a written instrument which he takes as evidence of title. *Freeman's National Bank v. Savery*, 127 Mass. 75.

A majority of the court, therefore, concur in the opinion that there must be

Judgment for the plaintiffs.

LOUISA FORSTER *vs.* EDWARD J. FORSTER.

Suffolk. Nov. 18, 1879. — Oct. 23, 1880. MORTON & SOULE, JJ., absent.

SARAH P. TUCKER *vs.* JAMES DESHON & another.

Suffolk. Nov. 18, 1879. — Oct. 23, 1880. MORTON & SOULE, JJ., absent.

GEORGE P. BALDWIN *vs.* UNION INSTITUTION FOR SAVINGS.

Suffolk. November 24, 1879. — October 23, 1880.

FREDERICK D. ELY *vs.* JEREMIAH DEAN.

Suffolk. March 12. — October 23, 1880.

WILLIAM H. SLOCUM *vs.* CITY OF BOSTON.

Suffolk. March 3. — Oct. 23, 1880. ENDICOTT & SOULE, JJ., absent.

ALICE L. PRENTICE *vs.* CITY OF WORCESTER.

Worcester. Oct. 6. — 23, 1880. COLT & MORTON, JJ., absent.

After a decision of this court that a tax sale of real estate was void on account of a defect in the notice thereof, a statute was passed enacting that no such sale previously made should be held to be invalid by reason of such defect, provided that the act should not apply to any case wherein proceedings at law or in equity had been begun involving the validity of such sale, nor to any real estate which had been alienated between a certain date (which was the date of the decision) and the passage of the act. *Held*, that the statute was unconstitutional.

A tax on real estate may be assessed to a person who appears by the records to be the owner, if the municipality assessing the tax has no notice that he has previously conveyed the land.

Under the St. of 1862, c. 183, § 6, which provides that a collector's deed of land sold for taxes shall contain a special warranty that the sale has been conducted according to the provisions of law, and gives the purchaser the right, if it subsequently appears that he has no claim to the property sold, by reason of informality in the proceedings, upon surrender of his deed, to the amount paid by him "together with ten per cent interest per annum on the same," "in full satisfaction of all claims for damages," interest, in an action on the covenant of warranty, may be recovered at that rate to the time of judgment.

On a petition against a city to recover damages for the taking of land for a highway, the petitioner claimed title under a deed from the collector on a sale for taxes, and also under a deed from the collector to the city on another sale for taxes, and a release from the city of its title and interest under the collector's deed. *Held*, that the city was not estopped to deny that the petitioner had no title by reason of the invalidity of the notices of the sales.

GRAY, C. J. By the Gen. Sts. c. 12, §§ 28-30, the collector, before selling real estate for taxes, is required to publish and post a notice of the time and place of sale, containing, among other things, a substantially accurate description of the several rights, lots or divisions of the estate to be sold. By § 33, if the taxes are not paid, he is required, at the time and place appointed for the sale, to sell by public auction so much of the real estate, or the rents and profits of the whole estate for such term of time, as shall be sufficient to discharge the taxes and necessary intervening charges; he is allowed at his option to sell the whole or any part of the land; and is directed, after satisfying the taxes and charges, to pay the residue of the proceeds of the sale, if any, to the owner of the land.

In *Wall v. Wall*, 124 Mass. 65, decided on February 8, 1878, it was adjudged by this court that the collector had no authority to sell an undivided interest in the land, so as to constitute the purchaser tenant in common with the owner; and that, when the only previous notice was that the land, or such undivided part thereof as might be necessary, would be sold, any sale, although of the entire parcel of land, was void.

On May 6, 1878, the Legislature passed a statute, to take immediate effect, in these words: "No sale heretofore made of real estate taken for taxes shall be held invalid by reason of the notice of sale having contained the words 'or such undivided portions thereof as may be necessary,' or the words 'or such undivided portions of them as may be necessary:' provided, however, that this act shall not apply to any case wherein proceedings at law or in equity have been commenced involving the validity of such sale, nor to any real estate which has been alienated since the eighth day of February of the current year and before the passage of this act." St. of 1878, c. 229.

The principal question presented and argued in each of these six cases is whether this statute is constitutional, as applied to sales, no suit involving the validity of which had been commenced before its passage, and where the real estate sold had not been alienated between February 8, 1878, and the passage of the act.

After mature advisement, and careful examination of the numerous cases cited at the bar, and giving due weight to the

strong presumption in favor of the validity of every act of the legislative department, all the judges feel themselves compelled by their judicial duty to declare that the statute in question exceeds the constitutional authority of the Legislature in two important respects.

First. The statute assumes to take away private property, without due process of law, and without compensation. While it is doubtless the duty of the citizen to pay all taxes legally assessed upon him for the support of the government, yet the validity of proceedings taking his land against his will in discharge of his tax depends upon no considerations of equity, but upon a strict compliance, on the part of the municipal officers, with the regulations previously prescribed by statute for the double purpose of securing the payment of the tax and of protecting the citizen against unnecessary sacrifice of his property. *Williams v. Peyton*, 4 Wheat. 77. The statutes under which the sales in question were made were framed to carry out this purpose by authorizing the collector to sell the whole land, or, if it was capable of division, any part of it; but giving him no power to sell an undivided interest therein. The notices given did not conform to those statutes, because they left it in doubt whether the collector intended to sell the whole of the land, as he lawfully might, or to sell an undivided part thereof, which he had no right to do. When such a notice is the only notice given, it cannot be presumed that the land brought an adequate price at the sale; for persons who might be ready to purchase the whole land might well be unwilling to purchase an undivided share which would make them tenants in common with a stranger, and might for that cause not attend the sale; and by reason of their absence, and for want of their bids, the price obtained might be the less, even if the collector should finally determine, at the moment of the sale, to put up and sell the whole lot.

Second. The statute is an attempt to exercise judicial power by the Legislature. It does not change the law for the future, nor establish a uniform rule for the past. While it undertakes to confirm past sales, made upon an illegal and insufficient notice, if no litigation has arisen concerning their validity, and the land has not been alienated since the decision of this court in

Wall v. Wall, it leaves sales already in litigation, or of lands which have been alienated since that decision, in the same condition in which they were before the statute was enacted. Its purport is to let the law, as declared by the decision of this court, apply to all future sales, and to all past sales coming within the two excepted classes; but, as to all other sales already made, to reverse the rule of law so declared, and to overrule that decision. It in effect declares that the title to land shall depend upon the questions, whether a suit to recover it has or has not been already commenced; whether the person who owned it at the time of the sale for taxes, relying on the terms of the statutes under which the sale was made, as showing that his title was unaffected thereby, or on the decision of this court as establishing that title, has kept his land, or has parted with it; and whether his grantee succeeded to his title before or since that decision. To illustrate: illegal sales for taxes have been made of two lots of land; the owner of one of them has brought an action to recover it before the passage of the statute; the owner of the other has not; the first recovers his land, the second loses it. Again: the owner of the one lot had alienated it before the decision in *Wall v. Wall*, or has kept it himself; the owner of the other lot has alienated it since that decision; in the first lot, the title of the owner or of his grantee is defeated; in the second, the title of the grantee is good.

We find it impossible to reconcile this statute with the fundamental principles, declared in the Constitution of the Commonwealth, that every subject has the right to be protected in the enjoyment of his property according to standing laws; that his property shall not be appropriated, even to public uses, without paying him a reasonable compensation therefor; that he shall not be deprived of his property or estate, but by the judgment of his peers or the law of the land; and that the legislative department shall never exercise the judicial power. Declaration of Rights, arts. 10, 12, 30.

There is nothing in the previous decisions of this court that requires or warrants a different conclusion. But as the scope and extent of some of those decisions have been misunderstood, a brief review of them may be convenient.

In *Grafton Bank v. Bickford*, 13 Grav, 564, proceedings in insolvency, had in a county in which the office of Judge of Insolvency was vacant, before the Judge of Insolvency of an adjoining county, were stayed by this court, upon the ground that it was not a case in which the Judge of Insolvency of the county was "from sickness, absence or other cause, unable to perform the duties required of him," within the meaning of the St. of 1856, c. 284, § 5. The Legislature afterwards, by the St. of 1860, c. 78, undertook to confirm all proceedings in insolvency so had, so far as they might be invalid for want of jurisdiction or authority in the judge. But that statute was held by this court to be unconstitutional, and therefore inoperative and void, not only as to the proceedings which had been stayed by the former judgment of this court, but likewise as to a case in which the order of a single justice staying the proceedings had been vacated by an appeal seasonably taken before the passage of the statute, so that at the time of its passage the case stood unaffected by any previous adjudication therein. *Denny v. Mattoon*, 2 Allen, 361. *Fayerweather v. Dickinson*, 2 Allen, 385 note.

In *Bacon v. Callender*, 6 Mass. 303, in which a statute providing that, in actions to recover lands which the tenant "now holds by virtue of a possession and improvement," he should be allowed for his improvements, was applied to actions pending at the time of its passage, the court merely held that the statute was as applicable to such actions as to those brought afterwards, and expressly reserved its opinion upon the general constitutionality of the statute, because that point had not been argued. In *Albee v. May*, 2 Paine, 74, a similar statute was upheld solely because the Constitution of the State of Vermont, in which the land was, contained no provision applicable to the case. But in other States, under constitutional provisions like those of our Declaration of Rights, such statutes have been held unconstitutional as applied to titles already vested. *Austin v. Stevens*, 24 Maine, 520. *Lambertson v. Hogan*, 2 Penn. St. 22. See also *Society for Propagation of Gospel v. Wheeler*, 2 Gallison, 105; *Albertson v. Landon*, 42 Conn. 209; *Webster v. Cooper*, 14 How. 488.

The early cases of *Walter v. Bacon*, 8 Mass. 468, *Patterson v. Philbrook*, 9 Mass. 151, and *Locke v. Dane*, 9 Mass. 360, in

which statutes confirming orders of courts of sessions extending the limits of jail yards beyond land owned by the county and the highways adjoining, which had been held by this court in *Baxter v. Taber*, 4 Mass. 361, to be illegal, were allowed a retrospective operation upon bonds already given for the liberty of the jail limits, and even where the debtor had gone beyond the legal jail limits before these statutes were passed, appear to have overlooked the distinction between the defining of those limits for the future, (which might well be held to be within the rightful authority of the Legislature and the meaning of previous bonds,) and the taking away of rights of action upon such bonds, which had accrued before the passage of the statute. To the extent of taking away such rights of action, they have not been approved in later cases. *Reed v. Fullum*, 2 Pick. 159. *Simmons v. Hanover*, 23 Pick. 188, 194. *Davison v. Johonnot*, 7 Met. 388, 396. *Wildes v. Vanvoorhis*, 15 Gray, 139, 148. *Denny v. Mattoon*, 2 Allen, 385.

General statutes changing joint tenancies into tenancies in common, the validity of which has been upheld as applied to tenancies existing at the time of their passage, merely cut off future rights of survivorship, and, while they give the tenant who dies first a more beneficial tenure than he had before, take nothing from the survivor which his cotenant might not himself defeat in his lifetime by conveying his own interest to a stranger or by suing for partition. *Miller v. Miller*, 16 Mass. 59. *Burghardt v. Turner*, 12 Pick. 534, 539. *Dunn v. Sargent*, 101 Mass. 336, 340. *Bambaugh v. Bambaugh*, 11 S. & R. 191. 4 Kent Com. 363, 364.

Special resolves of the Legislature, authorizing the sale of lands of minors or of trust estates, and the investing and holding of the proceeds upon the same uses and trusts as before, have been sustained, as merely providing for a change of investment. *Rice v. Parkman*, 16 Mass. 326. *Davison v. Johonnot*, 7 Met. 388. *Sohier v. Massachusetts General Hospital*, 3 Cush. 483. *Clarke v. Hayes*, 9 Gray, 426. *Watkins v. Holman*, 16 Pet. 25. *Leggett v. Hunter*, 19 N. Y. 445. *Norris v. Clymer*, 2 Penn. St. 277.

In *Foster v. Essex Bank*, 16 Mass. 245, the point decided was that a statute continuing corporations in existence for three

years after the time limited by their charters, for the purpose of suing and being sued, might constitutionally apply to existing corporations. In *Simmons v. Hanover*, 23 Pick. 188, the only question was whether this court could entertain jurisdiction of a bill in equity under a statute passed after the filing of the bill, and in terms ratifying proceedings already had. In each of those cases, the statute affected no vested right, but matter of remedy only.

The other cases in which retrospective statutes have been sustained in this court and in the Supreme Court of the United States, (without considering whether all of the latter which arose in other States could have been decided in the same way under the Constitution of this Commonwealth,) are distinguishable from the cases at bar, and may be classified as follows:

1st. Cases of statutes confirming sales of land under order of court for an adequate consideration, where there was a want of jurisdiction in the court, or the deed was irregularly made to another person than the actual bidder, or the sale was after the time limited in the license, or the confirming statute was passed upon the petition of all parties having the legal title. *Wilkinson v. Leland*, 2 Pet. 627, 661, and 10 Pet. 294. *Kearney v. Taylor*, 15 How. 494. *Cooper v. Robinson*, 2 Cush. 184, 190. *Sohier v. Massachusetts General Hospital*, 3 Cush. 483.

2d. Cases of statutes confirming conveyances by an executor or trustee under a will, where the only objection was to the manner of his previous appointment and giving bond, which might perhaps not be open to be contested in a collateral proceeding, even if no such statute had been passed. *Weed v. Donovan*, 114 Mass. 181. *Bradstreet v. Butterfield*, ante, 339. *Bassett v. Crafts*, ante, 513. Such statutes are somewhat analogous to statutes confirming deeds acknowledged before a person acting as a magistrate, whose commission as such had expired, which could not have been questioned collaterally, he being an officer *de facto*. *Brown v. Lunt*, 37 Maine, 423. *Denny v. Mattoon*, 2 Allen, 384. *Sheehan's case*, 122 Mass. 445, 447. *Hussey v. Smith*, 99 U. S. 20, 24.

3d. Cases of statutes curing defects in the execution of private deeds and instruments, so as to give them effect according to the intention of the parties and the equities of the case.

Randall v. Kreiger, 23 Wall. 137. *Wildes v. Vanvoorhis*, 15 Gray, 189. *Denny v. Mattoon*, 2 Allen, 377, 378, 383.

4th. Cases of statutes confirming votes of towns for municipal or public purposes, which are within the paramount control of the Legislature. *Thomson v. Lee County*, 3 Wall. 327. *Beloit v. Morgan*, 7 Wall. 619. *New Orleans v. Clark*, 95 U. S. 644. *Guilford v. Supervisors of Chenango*, 3 Kernan, 143. *Allen v. Archer*, 49 Maine, 346. *Freeland v. Hastings*, 10 Allen, 570.

5th. Cases of statutes confirming informal or irregular assessments of taxes, so that they might be collected in the future, but not undertaking to give force to illegal seizures or sales of property already made. *Mattingly v. District of Columbia*, 97 U. S. 687. *Grim v. Weissenberg School District*, 57 Penn. St. 433. *Hart v. Henderson*, 17 Mich. 218.

6th. Cases in which the only point before the court was whether the statute in question contravened the Constitution of the United States, as being an *ex post facto* law, or a law impairing the obligation of contracts. *Calder v. Bull*, 3 Dall. 386. *Satterlee v. Matthewson*, 2 Pet. 380. *Watson v. Mercer*, 8 Pet. 88. *Charles River Bridge v. Warren Bridge*, 11 Pet. 420. *Baltimore & Susquehanna Railroad v. Nesbit*, 10 How. 395. *Carpenter v. Pennsylvania*, 17 How. 456. *Florentine v. Barton*, 2 Wall. 210.

The other cases in the courts of various States, cited in argument, afford no precedent for the action of the Legislature in the statute before us, depend much upon the Constitutions and usages of the several States, and cannot be examined in detail without extending this opinion to too great a length.

The result is, that in *Forster v. Forster* the bill in equity by the owner of the land, to remove a cloud upon the title by reason of a sale for taxes under a defective notice, is maintained. *Davis v. Boston*, ante, 377. *Decree for the plaintiff.*

In *Tucker v. Deshon*, the bill is to remove a cloud upon the plaintiff's title by reason of sales for taxes in 1875, 1876, 1877 and 1878, the notice of the last of which only was in due form. The only objection to the validity of this sale is that the tax was assessed to Caroline W. Flagg, who, the plaintiff contends, was neither the owner nor in possession of the land on May 1, 1877, as required by the Gen. Sts. c. 11, § 8. But it appears by

the facts agreed that she became the owner of the land under a deed from Martin Batty, which was duly recorded on April 1, 1874, and that, although she executed a deed reconveying the land to Batty on October 26, 1875, this deed was not recorded until November 14, 1878. By the Gen. Sts. c. 89, § 3, no conveyance of real estate is "valid and effectual against any person other than the grantor, and his heirs and devisees, and persons having actual notice thereof, unless it is made by a deed recorded." As the city is not shown to have had any notice of the unrecorded deed, the tax of 1877 might lawfully be assessed to the person who had previously been, and who by the records appeared still to be, the owner of the land. But so far as relates to the sales made by the collector in 1875, 1876 and 1877, the case stands like *Forster v. Forster*, and there must be a

Decree for the plaintiff.

In *Baldwin v. Union Institution for Savings*, in which the demandant in a writ of entry claims title under the tax sale, the judgment on the agreed statement of facts for the tenant must be

Affirmed.

In *Ely v. Dean*, in which the tenant claims title under the tax sale, his exceptions must be

Overruled.

In *Slocum v. Boston*, the plaintiff brings an action of contract under the St. of 1862, c. 183, § 6, which provides that the deed of a collector under the Gen. Sts. c. 12, § 35, shall contain a special warranty that the sale has in all particulars been conducted according to the provisions of law; "and, if it should subsequently appear that, by reason of any error, omission or informality in any of the proceedings of assessment or sale, the purchaser has no claim upon the property sold, there shall be paid to said purchaser, upon his surrender and discharge of the deed so given, by the town or city whose collector executed said deed, the amount paid by him, together with ten per cent interest per annum on the same, which shall be in full satisfaction of all claims for damages for any defect in the proceedings." The plaintiff, having bought and paid for lands, and received such deeds from the collector, upon two sales for taxes under defective notices, offered, before bringing this action, to surrender and discharge those deeds, but the city refused to accept such discharge and surrender. He is therefore, by the terms of the

statute, entitled to recover the amounts paid by him, with interest at the rate of ten per cent; and such interest, given by statute by way of damages, is to be computed at that rate to the time of the judgment. *Union Institution for Savings v. Boston*, ante, 82. *Judgment for the plaintiff accordingly.*

In *Prentice v. Worcester*, which is a petition to recover damages for the taking of land for a highway, the petitioner claims title, 1st, under a deed to himself from the collector in 1876, upon a sale for taxes; 2d, under a deed from the collector to the city in 1874, according to the St. of 1862, c. 183, § 3, upon a previous sale for taxes, and a deed by which in 1876 the city released to the plaintiff "all title and interest accrued under and by virtue of" the deed from the collector to the city. The notices of both the sales for taxes having the same defects as in the other cases, the deeds of the collector passed no title to the plaintiff or to the city, and the release of the city, containing no covenants, passed no title to the plaintiff, and there must be

Judgment on the verdict for the respondent.

The cases were argued by *H. W. Bragg*, for Louisa Forster, and *C. W. Turner*, for Edward J. Forster; by *C. Allen & J. Fox*, for Tucker, and *N. Morse & T. M. Babson*, for Deshon; by *S. W. Clifford, Jr.*, for Baldwin, and *J. C. Crowley & J. A. Maxwell*, for the Union Institution for Savings; by *J. W. Hubbard*, for Dean, and *F. D. Ely, pro se*; by *C. A. Williams*, for Slocum, and *T. M. Babson*, for the City of Boston; and by *F. P. Goulding & W. A. Gile*, for Prentice, and *F. P. Blackmer*, for the City of Worcester.

In addition to some of the cases referred to in the opinion, there were cited, in support of the validity of the St. of 1878, c. 229, the following authorities: *Goshen v. Stonington*, 4 Conn. 209. *Mather v. Chapman*, 6 Conn. 54. *Beach v. Walker*, 6 Conn. 190. *Norton v. Pettibone*, 7 Conn. 319. *Thames Manuf. Co. v. Lathrop*, 7 Conn. 550. *Bellows v. Weeks*, 41 Vt. 590. *Jackson v. Gilchrist*, 15 Johns. 89, 114. *State v. Fuller*, 5 Vroom, 227. *Strauch v. Shoemaker*, 1 Watts & Serg. 166. *Tate v. Stooltzfoos*, 16 S. & R. 35. *Chestnut v. Shane*, 16 Ohio, 599. *Butler v. Toledo*, 5 Ohio St. 225. *Brevoort v. Detroit*, 24 Mich. 322. *Fairfield v. People*, 94 Ill. 244. *In re Goodell*, 89 Wis. 282. *Allen v.*

Armstrong, 16 Iowa, 508. *Boardman v. Beckwith*, 18 Iowa, 292. *McCready v. Sexton*, 29 Iowa, 356. *Iowa Railroad v. Soper*, 39 Iowa, 112. *Todd v. Clapp*, 118 Mass. 495. *Commonwealth v. Hamilton Manuf. Co.* 120 Mass. 388. *Cooley Const. Lim.* 107, 307, 371. *Sedgw. St. & Const. Law*, 640. *Bacon De Augm. Scient. lib.* 8, c. 3, aphor. 47-51.

Against the validity of the statute were cited the following additional cases: *Ogden v. Blackledge*, 2 Cranch, 272. *United States v. Klein*, 13 Wall. 128, 148. *Davidson v. New Orleans*, 96 U. S. 97. *Holden v. James*, 11 Mass. 396. *Blanchard v. Russell*, 13 Mass. 1, 14. *King v. Dedham Bank*, 15 Mass. 447. *Medford v. Learned*, 16 Mass. 215. *Holyoke v. Haskins*, 5 Pick. 20. *Picquet, appellant*, 5 Pick. 65. *Wheelwright v. Greer*, 10 Allen, 389. *Simonds v. Simonds*, 103 Mass. 572. *White v. White*, 105 Mass. 325. *Sparhawk v. Sparhawk*, 116 Mass. 315. *Connecticut River Railroad v. County Commissioners*, 127 Mass. 50, 57. *Kennebec Proprietors v. Laboree*, 2 Greenl. 275. *Lewis v. Webb*, 3 Greenl. 326. *Oriental Bank v. Freese*, 18 Maine, 109. *Beach v. Walker*, 6 Conn. 190. *Booth v. Booth*, 7 Conn. 350. *Hubbard v. Brainard*, 35 Conn. 563. *Hill v. Sunderland*, 3 Vt. 507. *Dash v. Van Kleeck*, 7 Johns. 477. *Taylor v. Porter*, 4 Hill, 140. *Parmelee v. Thompson*, 7 Hill, 77. *Powers v. Bergen*, 2 Selden, 358. *People v. Supervisors*, 16 N. Y. 424. *Pell v. Ulmar*, 21 Barb. 500, and 18 N. Y. 189. *Hopkins v. Mason*, 61 Barb. 469. *Williamson v. New Jersey Railroad*, 2 Stew. (N. J.) 311, 334. *O'Connor v. Warner*, 4 Watts & Serg. 223. *Norman v. Heist*, 5 Watts & Serg. 171. *Hepburn v. Curtis*, 7 Watts, 300. *Hillyard v. Miller*, 10 Penn. St. 326, 328. *Greenough v. Greenough*, 11 Penn. St. 489. *Snyder v. Bull*, 17 Penn. St. 54, 58. *McCarty v. Hoffman*, 23 Penn. St. 507. *Reiser v. William Tell Association*, 39 Penn. St. 137. *Shonk v. Brown*, 61 Penn. St. 320, 327. *Alter's appeal*, 67 Penn. St. 341. *Haley v. Philadelphia*, 68 Penn. St. 45. *Connell v. Connell*, 6 Ohio, 353, 358. *Silliman v. Cummins*, 13 Ohio, 116. *Groesbeck v. Seeley*, 13 Mich. 329. *Case v. Dean*, 16 Mich. 12. *Walpole v. Elliott*, 18 Ind. 258. *Wantlan v. White*, 19 Ind. 470. *White v. Flynn*, 23 Ind. 46. *Marsh v. Chestnut*, 14 Ill. 223. *McDaniel v. Correll*, 19 Ill. 226. *Conway v. Cable*, 37 Ill. 82. *Wilson v. McKenna*, 52 Ill. 43. *Reed v. Tyler*, 56 Ill. 283.

Orton v. Noonan, 23 Wis. 102. *Nelson v. Rountree*, 23 Wis. 367. *Brinton v. Seevers*, 12 Iowa, 389. *Penn v. Clemans*, 19 Iowa, 372. *McCready v. Sexton*, 29 Iowa, 356. *McComb v. Bell*, 2 Minn. 295. *Thompson v. Morgan*, 6 Minn. 292. *National Bank v. Iola*, 9 Kans. 689. *Wright v. Cradlebaugh*, 3 Nev. 341. *Baltimore v. Horn*, 26 Md. 194. *Seibert v. Linton*, 5 W. Va. 57. *Wally v. Kennedy*, 2 Yerger, 554. *Governor v. Porter*, 5 Humph. 165. *Calhoun v. McLendon*, 42 Ga. 405. *Hitchcock v. Way*, 6 Ad. & El. 943.

Against the validity of the assessment of the tax, for nonpayment of which the fourth sale in *Tucker v. Deshon* was made, were cited: *Desmond v. Babbitt*, 117 Mass. 233. *Marshall v. Fisk*, 6 Mass. 24. *Belchertown v. Dudley*, 6 Allen, 477. *Conway v. Ashfield*, 110 Mass. 113.

JOHN A. WORTHEN vs. ELIAS R. CLEVELAND.

Middlesex. Jan. 7. — June 23, 1879. COLT & ENDICOTT, JJ., absent.
Jan. 13. — Oct. 22, 1880. COLT & LORD, JJ., absent.

If a petition to enforce a mechanic's lien, under the Gen. Sts. c. 150, is filed in vacation, the order of notice issued under the St. of 1871, c. 78, need not be made returnable at the next term.

On a petition to enforce a mechanic's lien, it appeared that the respondent agreed to convey a parcel of land to a person on condition that the latter should build a house upon the land within a certain time. This person made a contract with the petitioner to build a cellar wall warranted to stand. The wall was completed, but was afterwards injured by the action of the frost, and was repaired by the petitioner after his employer's authority to bind the respondent had ceased. The petitioner filed his statement of lien more than thirty days after he completed the wall, and within thirty days after he made the repairs. *Held*, that, if he made the repairs without the authority of the respondent, he could not enforce his lien; otherwise, if he acted in good faith to fulfil his warranty, at the request of the respondent, the latter having knowledge of the terms of the contract under which the wall was built.

If the finding of a judge, who tries a case without a jury, is the answer to a question framed, and the answer depends wholly on the view of the law taken by the judge on a point on which a ruling is asked, and is adverse to the ruling asked, the whole matter is open on a bill of exceptions.

PETITION, under the Gen. Sts. c. 150, to enforce a mechanic's lien for labor performed in building the cellar of a dwelling-house on land of the respondent in Melrose. Trial in the Superior Court, without a jury, before *Wilkinson, J.*, who allowed a bill of exceptions, in substance as follows:

On May 15, 1876, the petitioner filed his lien statement in the office of the town clerk of Melrose; and on July 15, 1876, filed his petition in the clerk's office of the Superior Court, in vacation. On October 28, 1876, an order of notice was issued returnable at December term following. The respondent contended that the order of notice should have been issued in season to be returnable at September term, and that the petitioner by his delay had lost his lien, if he ever had one. This objection was overruled.

On October 4, 1875, the respondent executed an indenture with John B. Canfield, by which he agreed to convey the land on which the lien was claimed to Canfield, upon the performance by the latter of certain conditions, one of which was to erect a dwelling-house thereon on or before January 1, 1876, and another was that Canfield should repay to the respondent all moneys advanced by him for the erection of the building. The time of performance was afterwards extended to April 1, 1876.

After the making of this indenture, in the same month, the petitioner made a contract with Canfield to furnish the materials and build a concrete cellar for a dwelling-house upon the land for the sum of \$200. The cellar was to be built so as to stand, and was warranted to stand. The cellar was finished in the latter part of November 1875, except its liability to fall down from the action of the frost, but there was no acceptance of the work. In the course of the following winter, portions of the concrete fell down, and the walls were damaged by the action of the frost. In February and April 1876, this fallen concrete and the damaged walls were remedied. The last work done by the petitioner on the cellar in restoring it to the condition called for by his contract, after the action of the frost, was on April 17, 1876.

The respondent asked the judge to rule that the contract of the petitioner was completed in November 1875: that the

alleged warranty of the cellar wall would not entitle him to keep alive his lien, if any, by any subsequent labor on it; and that, therefore, he did not file his statement in the town clerk's office within the time required by law. The judge declined so to rule.

One of the issues framed was, "Did the petitioner file his certificate of claim within the time specified by law?" The answer to this was, "Yes." The respondent then asked the judge to rule that the petitioner was not entitled to recover. The judge declined so to rule; and found for the petitioner. The respondent alleged exceptions.

C. S. Lincoln, for the respondent.

A. H. Briggs & E. B. Smith, for the petitioner.

SOULE, J. The suit for enforcing a mechanic's lien for labor or materials done or furnished in the erection or alteration of a building may be begun by filing a petition in court, in term, or in the clerk's office in vacation; Gen. Sts. c. 150, § 8; or by inserting the petition in a writ to be served, returned and entered as are writs in other cases. § 9. When the suit is begun by petition not inserted in a writ, "the court in which the petition is entered, or the clerk thereof in vacation, shall order notice to be given to the owner of the building or structure, that he may appear and answer thereto at a certain day in the same term, or at the next term, by serving him with an attested copy of the petition with the order of the court or clerk thereon, fourteen days at least before the time assigned for the hearing." St. 1871, c. 78. This statute differs from the Gen. Sts. c. 150, § 14, for which section it was substituted, only in giving authority to the clerk to issue the orders named in it in vacation. The same provision was in the Rev. Sts. c. 117, § 7, as in the Gen. Sts. c. 150, § 14. It has been repeatedly held that those statutes did not require the order of notice to be issued during the term at which the petition was entered, nor to be returnable at that term or at the next term. The court gets jurisdiction of the petition by virtue of the entry, and has a discretion to assign a time for hearing whenever in its judgment it may be most beneficial for the parties to have the time fixed. The notices to the parties are in season if given after the assignment is made, and are in other respects in conformity to the requirements of the

statutes. *Rockwood v. Walcott*, 8 Allen, 458. *Donnell v. The Starlight*, 103 Mass. 227. The objection of the respondent to the proceedings, that the petitioner had not any rights by reason of the delay in obtaining the order of notice, was properly overruled.

The petitioner did not perform labor on the respondent's land under any agreement with him. He did certain work in building a cellar wall in the fall of the year 1875, under a contract with Canfield, by which contract he warranted that the wall should stand. The wall was completed in November. Canfield caused the wall to be built pursuant to a contract with the respondent, which contemplated the erection of a building by Canfield on the premises before January 1, 1876, as a condition precedent to the conveyance of the premises to Canfield; another condition being that Canfield should repay to the respondent all moneys advanced by him for the erection of the building. The time of performance was afterward extended to April 1, 1876. If the petition had been filed within the time required by statute after the petitioner ceased working in November, the relations of Canfield to the respondent under their contract were such as to enable the petitioner to maintain a lien for whatever might be due him for his labor. *Hilton v. Merrill*, 106 Mass. 528. Canfield at that time had authority to erect a building on the premises, and an implied consent from the respondent to the employment of the petitioner to aid in the work. This implied consent grew out of the contract, and when the time specified in the contract, as extended, had elapsed without fulfilment by Canfield of his duty under the contract, so that he no longer had the right to erect a building or to call on the respondent for advances of money for the building, or to require of him a conveyance of the land, the implied consent that Canfield should employ others to aid in erecting the building had ceased to exist. The work done by the petitioner in the month of April was in the nature of repairs, for the purpose of making good his warranty of the stability of what he did in the previous October and November, and cannot be regarded as consented to by the respondent by reason of the authority conferred on Canfield under a contract which had expired. *Rockwood v. Walcott, ubi supra*. There is nothing in the case of *Hilton*

v. *Merrill*, *ubi supra*, which conflicts with the views here expressed. In that case, the owner of the land had contracted to convey it to Potier whenever he should pay a certain price for the land, and all moneys advanced for building the house, with interest, so that, though the work for which the plaintiff sought to maintain a lien was done after the time when by the contract the house was to be completed, it was done while Potier still had the right to build and to call for a conveyance.

The learned judge who tried the case in the Superior Court erred, therefore, in refusing to rule, as requested by the respondent, that the contract of the petitioner was completed in November 1875, and that the alleged warranty of the wall would not entitle him to keep his lien alive by any subsequent labor on it. For, although the language of the prayer may be capable of another construction, it must have been understood to ask a ruling that, the petitioner having built the entire wall called for by his contract in November 1875, the alleged warranty would not entitle him to keep his lien alive by subsequent labor on it in the spring months of 1876.

The finding of the learned judge, that the petitioner filed his claim in season, is apparently a finding of fact, and it is well settled that a finding of fact by a judge in the trial of a cause without a jury cannot be reviewed by this court. *Turner v. Wentworth*, 119 Mass. 459. But this so-called finding of fact is the answer to a question framed for the purpose of having the reply indicate whether, in the opinion of the judge, the work done in the month of April 1876 was done under such circumstances that a lien could be maintained by virtue of it. This was the only question in dispute. There was no controversy between the parties as to the date of ceasing to work in April and that of filing the certificate. As the answer to the question depended wholly on the view of the law taken by the judge on a point on which a ruling was asked, and was adverse to the ruling asked, the whole matter is open to the examination of this court on the bill of exceptions. *Exceptions sustained.*

Upon a second trial in the Superior Court, without a jury, before *Gardner, J.*, the petitioner offered evidence tending to

show that the contract between himself and Canfield was made by the respondent personally with the petitioner, the respondent acting as the agent of Canfield; that, in April, the respondent complained to the petitioner that the cellar was falling down, and requested the petitioner to see to it; that, in March, the petitioner asked the respondent for money upon his contract for building the cellar, and the respondent answered, "As soon as you have got your job finished, we will try and get you some money;" and that the respondent knew of the work being done in April, at the time the same was done. All this evidence was controverted by the respondent.

There was also evidence that, in November, the petitioner left off work upon the cellar, and that, if the wall stood, it was completed; that, from the exposure of the cellar, the work done upon it in April could not have been properly done at an earlier date.

The respondent requested the judge to rule as follows: "1. Any work which the petitioner did, required in consequence of the action of the frost, is in the nature of repairs, and will not operate to keep alive his lien. 2. The petitioner's warranty, contained in the contract with Canfield, does not bind him against the action of the frost. 3. If the petitioner's contract was completed before the repairs were made, the petitioner did not file his certificate within the thirty days from the time when he ceased to labor. 4. Canfield's rights under the contract ceased on April 1, and he could authorize no work upon which a lien could be enforced. 5. A promise by the respondent to pay the bill subsequent to the completion of the work will not create a lien."

The judge gave the third, fourth and fifth rulings, but declined to give the first and second rulings, and ruled as follows: "If the contract made by the petitioner with Canfield was to build the cellar and warrant it to stand, and if the cellar was built by the petitioner in October and November, and supposed by him to be finished, and if, by the action of frost in the following winter, parts of the cellar wall fell, and the petitioner in the following April, in good faith, worked upon the cellar for the purpose of making good his warranty

contained in his contract with Canfield, and if such labor done by the petitioner was with the knowledge and consent, and upon the request, of the respondent, and if the respondent knew the terms of the contract made between the petitioner and Canfield, in relation to the petitioner's building the cellar, such labor performed in April would operate to keep alive the petitioner's lien; but if such labor was not in fact consented to by the respondent, it would not operate to keep the lien alive."

The judge also found that the petitioner made the agreement with and furnished the labor for Canfield by authority and consent of the respondent; that Canfield did not perform the conditions of the indenture between himself and the respondent; that the petitioner filed his certificate of claim within the time specified by law; that the petitioner's claim was just and true; that the petitioner commenced this petition within the time specified by law; and thereupon found for the petitioner. The respondent alleged exceptions.

Lincoln, for the respondent.

Smith, for the petitioner.

SOULE, J. The judge of the Superior Court, who tried this case without a jury, must have found, as matters of fact, that the petitioner worked on the cellar in April, in good faith, for the purpose of making the cellar as good as he had warranted that it should be, and that he did this with the knowledge and consent of the respondent, and at his request, the respondent knowing the terms of the contract between the petitioner and Canfield for the building of the cellar. Unless all these facts were found, a decision for the petitioner could not have been made under the rulings of the court.

The facts thus found present the case in a different aspect from that which it assumed when it was first before us. It was then the case of a petitioner who, having contracted to do certain work for one who had agreed with the owner of the land to erect and complete a house on it before a certain date, did his work, as he supposed, according to his contract, and afterward, finding that his work was not well done, voluntarily, and without authority from any one, did further work, of the nature called for by his contract, after the time for completing the

house had passed, and when no one had authority from the owner to do any work on the premises.

The evidence on which the findings of the court were based is not reported, and we must take the findings as correct. It appears from the bill of exceptions that there was evidence which would have justified a finding that the petitioner understood, from the representations of the respondent to him, that the work done in April would be regarded as done under and in performance of the contract made in the previous October between the petitioner and Canfield. In this state of facts the rulings asked for in the first two requests of the respondent were properly refused, as not being appropriate to the case made by the evidence, and the ruling actually made on the matters covered by those requests was sufficiently favorable to the respondent. We therefore find no error in the rulings.

Exceptions overruled.



ELLIOT WALKER vs. ISAAC S. COOK & trustee.

Middlesex. Jan. 14. — Oct. 22, 1880. COLT & LORD, JJ., absent.

A town cannot be charged as trustee of an assessor of taxes, to whom no compensation has been voted, additional to that provided by the Gen. Sts. c. 11, § 52, as amended by the St. of 1878, c. 156.

TRUSTEE PROCESS. The town of Natick, summoned as trustee of the principal defendant, answered that, at the time of the service of process upon it, it had not in its hands or possession any goods, credits or effects of the defendant, and was not liable to be summoned or chargeable as trustee, unless the court should find otherwise on the following facts: At the annual March meeting of the town of Natick, the defendant was duly elected to the office of assessor of taxes for the current year. He accepted the office, was duly qualified, and entered upon and performed the duties of such office. Before the service of the plaintiff's writ, the assessors had completed their annual assessments,

and the warrant for the collection of taxes had been committed to the collector for collection, but no account had been rendered to the town of the number of days the defendant was employed in making the assessments. The defendant, before the service of this process, had been paid on account for his services the sum of \$75, and no more; and the sum which he is entitled to receive for his services, under the statutes fixing the pay of assessors, exceeds that sum and any sum which may be claimed for exemptions and costs of trustee. There was no vote of the town to pay the defendant for his services, and no contract made in relation thereto, except such as may be inferred from the above facts. The defendant was also elected and served as an assessor of the town the previous year.

The Superior Court, after a verdict for the plaintiff, ordered the trustee to be charged; and the trustee appealed to this court.

L. H. Wakefield, for the plaintiff.

P. H. Cooney, for the trustee.

ENDICOTT, J. The statutes provide that each town shall every year choose three or more assessors; that if a town neglects so to do, it shall forfeit to the use of the Commonwealth a sum not exceeding five hundred dollars, nor less than one hundred dollars, as the county commissioners shall order; and that any person chosen assessor, who shall neglect to take the oath of office, shall forfeit the sum of fifty dollars; Gen. Sts. c. 18, §§ 31-34, 53. These forfeitures must be paid into the treasury of the Commonwealth. Gen. Sts. c. 176, §§ 1, 2. *Colburn v. Swett*, 1 Met. 232.

The assessors, therefore, are public officers, in the performance of whose duties the whole community has an interest. Towns have no authority to direct or control them, but all their powers and duties are prescribed and regulated by statute; and, in case they do not perform their duties, the town has no remedy against them. They are not, in any sense, the agents or servants of the town, and the town, by the election of assessors, enters into no contract with them for the payment of their services. *Walcott v. Swampscott*, 1 Allen, 101. *Hafford v. New Bedford*, 16 Gray, 297. *Barney v. Lowell*, 98 Mass. 570. An

assessor is entitled to receive, from the town, two dollars and a half a day for his services ; and such other compensation as the town may allow. Gen. Sts. c. 11, § 52. St. 1873, c. 156. But, in the case at bar, the town of Natick did not vote any additional compensation. Assuming that an assessor can maintain an action to recover from a town his compensation of two dollars and a half per day, allowed by the statute, yet the right to recover depends upon the statute, and not upon any contract, express or implied, with the town. See *Moody v. Newburyport*, 3 Met. 431.

We therefore are of opinion, that the town in this case cannot be charged as trustee, and what the law provides for the payment of the defendant, as assessor, is neither goods, effects nor credits, entrusted or deposited in the hands or possession of the town, within the meaning of the Gen. Sts. c. 142, § 21.

It was said by Mr. Justice Metcalf, that, "to constitute the relation of trustee, there must be a privity of contract, express or implied, between the principal debtor in the trustee process and him who is sought to be charged as his trustee, unless there be a statute provision that renders such privity unnecessary. We can go no further than to charge a debtor as trustee of his creditor, when the debt or demand is the ordinary result of express or implied contract." *Williams v. Boardman*, 9 Allen, 570, and cases cited. *Burnham v. Beal*, 14 Allen, 217. See also *Adams v. Tyler*, 121 Mass. 380.

Trustee discharged.

MICHAEL HARRIGAN *vs.* CONNECTICUT RIVER LUMBER
COMPANY.

Hampden. Sept. 28. — Nov. 23, 1880. COLT & MORTON, JJ., absent.

Section 5 of the Gen. Sts. c. 78, providing that "no person shall cause or permit to be driven or floatedd down Connecticut River, any masts, spars, logs or other timber, unless the same are formed and bound into rafts and placed under the care of a sufficient number of persons to govern and manage the same so as to prevent damage thereby," is constitutional, even in the case of logs coming from one State and passing through this Commonwealth on their way to another State.

TORT for injuries to the plaintiff's pleasure boats, anchored in the Connecticut River, or fastened to a wharf upon the plaintiff's land in Springfield, caused by floating logs, sent down the river by the defendant, not formed into rafts nor attended by persons to manage the same. Trial in the Superior Court, before *Wilkinson, J.*, who allowed a bill of exceptions in substance as follows:

The plaintiff contended that as the logs were floated down the river in violation of the Gen. Sts. c. 78, § 5,* the defendant was *prima facie* guilty of negligence. The defendant contended that the statute, so far as it affected this case, was unconstitutional and void. It appeared by uncontradicted evidence that the Connecticut River was navigated from its mouth to Holyoke by a transportation company with barges loaded with seventy-five tons, drawn by steam tugs of fifty tons tonnage, but that the tide did not ebb and flow therein in this State; that the defendant, incorporated in 1878, under the laws of Connecticut, purchased and owned timber lands in the State of Vermont to the extent of one hundred and thirty thousand acres upon the banks

* "No person shall cause or permit to be driven or floated down Connecticut River, any masts, spars, logs or other timber, unless the same are formed and bound into rafts and placed under the care of a sufficient number of persons to govern and manage the same so as to prevent damage thereby. If damage is done to a bridge or dam upon or over said river, by any timber so driven or floated in any manner not herein allowed, the owner of the timber, and every person who causes or permits the same to be so driven or floated, shall be jointly and severally liable for all such damage, to be recovered by the party injured in an action of tort."

of the Connecticut River and its tributaries, upon which were six hundred and fifty million feet of lumber; that it owned a large steam mill at Northampton, in this State, on the said river, turning out sixty thousand feet a day, with an investment of \$60,000; that it owned another mill of larger capacity at Holyoke, in this State, with an investment of \$80,000, and still another at Hartford, in the State of Connecticut, of nearly as large capacity and capital; that its business was cutting, in the winter, the timber upon said lands, placing the logs in the Connecticut River in the spring, floating the logs down the river in drives of large quantities at a time to its different mills, sawing the logs into lumber, and selling the lumber in the market. There was evidence tending to prove that by reason of the rapids upon said river at Turner's Falls and Holyoke, within this State, it was absolutely impossible to comply with the first clause of said section, and to drive the logs in rafts over said rapids, and it must abandon the use of the Connecticut River if compelled so to do; that the defendant could unloose logs above rapids, and form them into rafts again after passing the rapids, but that the expense of so doing would be pecuniarily ruinous; that there was no other way of getting its timber into the markets of this State or of the State of Connecticut in any manner that was not ruinously expensive. It also appeared that the drives of logs generally occurred in July or August, and at intervals,—the logs running in the river for from two to four weeks,—and when so running, and at the time in question, substantially filled the river and prevented the use of it by pleasure boats, although the same did not intercept or prevent the large barges and steam tugs from the use of the river.

The defendant asked the judge to rule as follows: "If the jury find that, from the natural flow, current and bed of the river, it is impossible to bring and transport the timber of the defendant in the manner required by the Gen. Sts. c. 78, § 5, to its several mills, and from State to State, and place to place, and that the clause of the statute operates to destroy the defendant's business, and as a prohibition to the defendant of the use of the Connecticut River as a means and way of transportation, then the same is contrary to the Constitution of the United States, and is void. So if the compliance with the

provisions of the statute would be so expensive and onerous as to operate as an exclusion of the defendant from the river for the purpose of its business."

The judge declined to give any of the rulings asked for; but instructed the jury that the law was valid and operative in this case, and, if the plaintiff had sustained an injury by reason of an unlawful act on the part of the defendant without the plaintiff's fault, he was entitled to recover; that, if the logs were floated contrary to law, that was *prima facie* evidence of negligence; but if, upon the whole case, the jury were of the opinion that the defendant was not negligent, the plaintiff could not recover, and that the jury were to decide, under all the circumstances of the case, whether or not the defendant was negligent; and gave other full instructions pertinent to the case. The jury found for the plaintiff; and the defendant alleged exceptions.

G. M. Stearns, (*H. K. Hawes* with him,) for the defendant.

1. The Connecticut River is a great public highway between the States of Vermont, Massachusetts and Connecticut, and citizens of these States have the right to use it for the purposes of commerce and trade. *Commonwealth v. Chapin*, 5 Pick. 199, 202. *Adams v. Pease*, 2 Conn. 481. *Brown v. Chadbourne*, 31 Maine, 9. *Wadsworth v. Smith*, 11 Maine, 278. *Knox v. Chaloner*, 42 Maine, 150. *People v. Platt*, 17 Johns. 195, 211. *Hooker v. Cummings*, 20 Johns. 90. The driving of logs down the river from State to State for sale is navigation. *Brown v. Chadbourne*, *ubi supra*. *Treat v. Lord*, 42 Maine, 552, 561. *Carter v. Thurston*, 58 N. H. 104, 107. *Thompson v. Androscoggin Improv. Co.* 58 N. H. 108. And navigation is a part of commerce. *Gibbons v. Ogden*, 9 Wheat. 1, 189-191.

2. So far as § 5 of the Gen. Sts. c. 78, attempts to regulate commerce between the several States, it is in violation of the Constitution of the United States, art. 1, § 8. *Welton v. Missouri*, 91 U. S. 275, 282. *Foster v. New Orleans Port-Wardens*, 94 U. S. 246. *Inman Steamship Co. v. Tinker*, 94 U. S. 238, 245. *South Carolina v. Georgia*, 93 U. S. 4, 10. Whatever limits, impedes or affects transportation of property into or out of the country, or through the States, is a regulation of commerce, within the meaning of the Constitution. Any State legislation is void which creates an impediment to the free navigation

of public waters, or prescribes conditions in accordance with which commerce in particular articles or between particular places is required to be conducted. *Sherlock v. Alling*, 93 U. S. 99, 102. A State cannot tax passengers, as it is an attempt to regulate commerce, nor require a bond that an emigrant shall not become a pauper. *Henderson v. Mayor of New York*, 92 U. S. 259. *State Freight Tax case*, 15 Wall. 232. Nor require a bond that an emigrant is not a lewd woman. *Chy Lung v. Freeman*, 92 U. S. 275. Nor regulate the size or kind of vessel used in transportation. *Gibbons v. Ogden*, *ubi supra*. Nor tax an auctioneer's sales, if they include imported goods; nor discriminate against goods from other States. *Cook v. Pennsylvania*, 97 U. S. 566. Nor tax sales of products of other States by a pedler. *Welton v. Missouri*, *ubi supra*. Nor require hatchways to be surveyed. *Foster v. New Orleans Port-Wardens*, *ubi supra*. Nor prohibit the carriage of cattle from other States through any State except in a prescribed manner. *Railroad Co. v. Husen*, 95 U. S. 465. The rule seems to be that, if the legislation affects the modes and methods of foreign or interstate commerce, or impedes the same, it is void. If it simply declares the rights and duties of persons, it is valid, even though those duties affect the person's relations to commerce. *Sherlock v. Alling*, *ubi supra*. *Welton v. Missouri*, *ubi supra*.

It may be contended that this is only a police regulation. But it is settled that whatever laws a State may pass under its police power, if such attempts to legislate amount to a regulation of foreign or interstate commerce, they are void. *Henderson v. Mayor of New York*, and *Railroad Co. v. Husen*, *ubi supra*. The law in question distinctly undertakes to regulate the navigation of the Connecticut River with logs and timber. It prescribes the conditions of the use of the river, "the modes and methods of the commerce," the "rules by which it shall be governed." And its regulations, rules, and conditions, as the case finds, amount to a prohibition of the river for the transportation between the States of this merchandise. It appearing that the statute in question does regulate and prohibit interstate commerce, it cannot be valid, allowing the greatest police power to the State, unless the plaintiff shows a grave necessity for the exercise of this power. The only pretence for the destruction

of this great commercial and important interest is, that from two to four weeks in the year the prosecution of the enterprise prevents pleasure boats from using the river.

M. P. Knowlton & C. L. Long, for the plaintiff.

LORD, J. At the trial, no question was made of the propriety of any ruling except one upon the provisions of the Gen. Sta. c. 78, § 5. The presiding judge ruled that any acts done in violation of that statute were *prima facie* wrongful; and the only objection made by the defendant to the ruling is that the statute is unconstitutional, for the reason that it is not competent for the Legislature of the Commonwealth to pass any law upon that subject, it being within the exclusive jurisdiction of Congress in the exercise of its power "to regulate commerce among the several States."

The chapter, of which the section in controversy forms a part, contains six sections, and the title is "Of timber afloat or cast on shore." The other five sections of the chapter guard very strictly the rights of property in logs, masts, spars and other timber which is properly floating in the river; and interference with such property is prohibited under highly penal provisions. The statute does not profess to take from the character of the Connecticut River that of a great highway, and it is not necessary to consider whether strictly that river is or is not technically "navigable waters." The tide does not ebb and flow therein within the limits of this Commonwealth, and dams and bridges by authority of the Legislature of Massachusetts have been erected over and across it in various places.

It is not, in our view, necessary to discuss the relative rights of Congress and the Legislatures of the several States to pass laws affecting interstate commerce. No question upon that subject can be raised upon the facts in this case, nor can any such question be raised under this provision of law.

When there is such a state of facts, or there are such provisions of law, as to raise the question of such relative rights, a discussion of the subject is always interesting, nor is it wholly free from difficulty; and, if we confine ourselves to the words used by different judges, there is undoubtedly an apparent conflict in adjudicated cases. It is not important to consider in this case how far such conflict is real, or only apparent. There

is no doubt that, upon such a stream as this, matters may arise which are subject to State legislation, or that the stream may be the means of such interstate communication as to authorize the legislation of Congress to regulate the commerce thereon. In the comparatively recent case of *Railroad Co. v. Husen*, 95 U. S. 465, Mr. Justice Strong, in delivering the opinion of the court, uses this language: "While we unhesitatingly admit that a State may pass sanitary laws, and laws for the protection of life, liberty, health or property within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, &c. from entering the State; while for the purpose of self-protection it may establish quarantine, and reasonable inspection laws; it may not interfere with transportation into or through the State, beyond what is absolutely necessary for its self-protection." This language is broad enough to cover a much wider field of legislation than this statute attempts. As before said, this legislation does not attempt to deprive the Connecticut River of the character of a highway. It does not interfere with any use of it as such, and all interstate commerce may be conducted over its waters with the same freedom as over its roads, bridges and other highways. If the Legislature had ordered that the Connecticut River should not be used for the transportation of logs, masts and spars from the State of Vermont to the State of Connecticut, a very different question would have been presented. That question does not arise, and need not be discussed. That it is competent for the Legislature of a State to prescribe the mode in which its ways shall be used to avoid collision and conflict, and to prevent injury to persons or property rightfully thereon, and to prevent obstructions therein, cannot be questioned; and such legislation has no relation to, and does not interfere with, commerce between the States. The section of the law declares in its terms the object and purpose of its provisions. It requires logs, masts and spars to be so arranged that they may be controlled by those having them in charge, and its purpose is to prevent damage to dams and bridges, lawfully erected upon and across the river. Neither a log nor any number of logs floating upon the surface of a stream, uncontrolled and uncontrollable, is navigation or commerce.

The case perhaps most strongly relied upon by the defendant, that of *Railroad Co. v. Husen*, *ubi supra*, bears no analogy in its facts to the case at bar. The Legislature of Missouri had undertaken to enact that cattle from Texas should not be transported through the State of Missouri except in the particular mode pointed out in its statute. The law did not apply to any great river as a highway, nor to any of the ordinary public roads of the State; but to the mode of transportation within railway cars. If the State of Missouri had enacted a law that no cattle from Texas should be driven through that State upon its highways into another State for sale, it may be conceded that the decision of the Supreme Court of the United States in *Railroad Co. v. Husen* would have been applicable, and that such legislation was not within the authority of the State. To present any analogy between the passage of cattle through a State and the facts of the case at bar, the provision of law should be that no cattle from anywhere should be allowed to be at large in the street without a keeper; and when it has been decided by any competent authority that it is not within the power of a State Legislature by law to forbid cattle being at large in a highway without a keeper, there will be some foundation for the claim that a State has no power to prevent logs, masts and spars, uncontrolled and uncontrollable, from floating down the stream, carrying with them bridges and dams, and destroying every variety of boat and vessel employed in useful and lawful commerce.

The defendant, however, relies with much confidence upon the decision by the Supreme Court of Maine in the case of *Treat v. Lord*, 42 Maine, 552. It is contended that, by the decision in that case, the right of every person to float logs upon navigable waters is absolute, and the power to regulate it is alone in Congress. No such principle is embraced within that decision. Upon the other hand, the right of the State to legislate upon the subject is upheld as absolute, even to the extent of deciding that the use of such stream may be absolutely forbidden by the Legislature. The plaintiff in that case contended that, by a grant of five thousand acres of land made by the Legislature of the Commonwealth of Massachusetts, on February 7, 1820, he became possessed of the exclusive right to the use of the stream,

upon which his dam was erected, within the limits of his grant, and that such ownership authorized him to construct a dam across the stream because the grant was upon the condition, among other things, that he should give a bond with sureties that he would within two years erect and put in operation a good and sufficient saw-mill and grist-mill on the stream in question, and that he had thus erected such mill, and that said mill at the time of the alleged trespass was standing and in operation. The important question decided by the court was not whether the Legislature had authority to act upon the subject of the use of that stream, but whether, as matter of fact, it had acted. It was stated in that case that there was a distinction between the rights of property in a State and the rights of sovereignty; that the former could be lost by non-use or by disseisin; that the latter could not thus be lost; and in construing the grant to Treat, the court held that the grant was a grant only of property, and was not in any sense a grant of its rights of sovereignty; that the right of every individual to use the waters of such a stream could not be taken away by any grant of the right of property in it by the State, because a grant of the right of property is construed as having been made subject to that public easement which can be destroyed only by an exercise of sovereignty by the Legislature. The opinion in that case is carefully analyzed, and the various head-notes very clearly state the exact points decided, the first of which is in these words: "The State, by virtue of its sovereignty or right of eminent domain, may abridge, control or destroy a public easement in a stream within its limits; but, until it does so by positive legislation, all persons may lawfully enjoy such easement in common with the State." If this proposition is sound, it is clear that the authority of the Legislature is much more extensive than that which has been exercised by the Legislature of Massachusetts. The next essential point decided in that case is that "a conveyance by the State of all its right, title and interest in and to the lands over which a navigable stream flows, does not authorize the grantee, or those claiming under him, to use exclusively or to destroy the public easement in said stream."

Neither of these propositions, nor any other decided in that case, has the slightest bearing upon any question involved in the

present case. There is no intimation that the Legislature has not authority to regulate the mode in which the easement should be used; but, on the other hand, the power is expressly asserted in the Legislature, not only to regulate, but to prohibit the exercise of the right; nor is there anything in the report of the case which, by implication even, can be understood as recognizing the fact that a single log or many logs floating uncontrolled, with no power of the owner over them, is either commerce or navigation. All the language of the report implies that the logs were at all times under the control and direction of those driving them. It would be impossible upon any other theory to satisfy the rules of law which were given to the jury in regard to the care and diligence of the defendant, and the respect which he was bound to have for the plaintiff's rights, and that his own must be so exercised as to do the least injury to the plaintiff's property. It would be a mere absurdity to say that the right to use the river for logs tumbled into the stream, and floating down uncontrolled, and carrying with them the plaintiff's dam, is consistent with the law declared in that case.

The case of *Carter v. Thurston*, 58 N. H. 104, is no more favorable to the claim of the defendant. In that case it was decided only that any person had the right to make a reasonable use of a public stream; that in such use he was not responsible for any damage done without his fault, that is, that the use itself is not a wrong-doing; but that he is responsible for injury done by his carelessness.

There is no ground for the inference that, in the use of the river as a highway, the Legislature may not make suitable regulations for its more convenient and safe use by persons having equal rights thereon, or that a use in violation of such regulation is authorized under the Constitution of the United States, and cannot be limited by State legislation because such regulation is an interference with interstate commerce.

Exceptions overruled.

MARGARET PORTER vs. L. W. GILES & others.

Bristol. Oct. 27. — Nov. 3, 1880. AMES & ENDICOTT, JJ., absent.

Upon a bond given under the St. of 1877, c. 97, by a person having an interest in money or credits attached by trustee process, to dissolve such attachment, with condition to pay to the plaintiff the sum for which the trustee may be charged, if any, within thirty days after final judgment, no action can be maintained, if the trustee has been discharged in the trustee process.

CONTRACT upon a bond given under the St. of 1877, c. 97, for the dissolution of an attachment by trustee process. Trial with out a jury in the Superior Court, before *Putnam*, J., who found the following facts :

The plaintiff brought an action against Alford Greenough and against the King Philip Mill as his trustee. The present defendant Giles, claiming an interest by assignment in pais in the money and credits in the hands of the trustee, gave and filed the bond now sued on, with the other defendants as his sureties, reciting the attachment by trustee process of such money and credits, and his desire to dissolve that attachment as provided in the St. of 1877, c. 97, § 1, and conditioned to pay to the plaintiff "the said sums to which this bond applies, and for which said trustee may be charged, if any, in said suit, not exceeding the value of the property in the hands of said trustee at the time of the service of the plaintiff's said writ upon said trustee, or so much thereof as will satisfy the amount recovered by the plaintiff, within thirty days after final judgment, or any special judgment entered in accordance with the provisions of" the St. of 1875, c. 68, § 1.

On the day on which the bond was given, the plaintiff's attorney made and signed this indorsement thereon, "I hereby approve of and accept the within bond, and in consideration of the same have discharged the trustee;" and the trustee paid over to Giles the sum of \$88.68, out of the amount due from the trustee to Greenough. In the trustee process, the claimant, Giles, was defaulted, the trustee discharged, and judgment entered for the plaintiff for \$80.96 damages and \$9.96 costs, and that judgment has never been in any part satisfied. This action was then brought upon the bond.

Upon these facts, the judge ruled that the plaintiff could not recover, because the trustee had not been charged, but had been discharged, in the trustee process; and, after finding for the defendants, reported the question of the correctness of this ruling for the determination of this court, according to whose opinion thereon judgment was to be entered for the defendants or for the plaintiff in the sum of \$90.92 and interest.

H. A. Dubuque, for the plaintiff.

J. M. Morton, Jr., for the defendants.

GRAY, C. J. The bond in suit was given pursuant to the St. of 1877, c. 97, which provides, in § 1, that any person having an interest, by assignment or otherwise, in money or credits attached by trustee process in an action against another, may at any time before final judgment dissolve such attachment, or any part thereof, by giving bond, with sureties, "with condition to pay to the plaintiff the sum to which the bond applies and for which the trustee may be charged, if any, not exceeding the value of the property in his hands, or so much thereof as will satisfy the amount recovered by the plaintiff, within thirty days after final judgment;" and, in § 2, that "upon the filing of the bond the trustee may deliver to the person, by whom or in whose behalf as principal such bond is given, the money or other thing in his hands, or that part thereof to which the bond applies, and shall not be liable to the plaintiff therefor, after such payment, and no execution shall issue against him therefor."

The sum "for which the trustee may be charged, if any," can only be ascertained in the suit to which he is a party; and the provision of the statute that "no execution shall issue against him" for the fund in his hands clearly implies that that suit shall proceed to judgment against him; just as in the ordinary case of a bond given by a defendant to dissolve an attachment on mesne process in a civil action, under the Gen. Sts. c. 123, § 104, with condition "to pay to the plaintiff the amount, if any, that he may recover, within thirty days after final judgment in such action," that action proceeds to judgment against the defendant. In either case, the fund or property attached is released from attachment, and consequently from execution; but a judgment must be rendered, in the suit in which the attachment is made, against the trustee in the one case, or against

the principal defendant in the other, in order to ascertain the amount which may be recovered under the bond given to dissolve the attachment.

The ruling of the court below, that the plaintiff could not recover in this action, because the trustee had not been charged, but had been discharged, in the trustee process, was therefore correct; and there must be *Judgment for the defendants.*



CATHERINE O'NEIL, administratrix, vs. JOHN HARRINGTON & trustee.

Bristol. Oct. 27. — Nov. 3, 1880. AMES & ENDICOTT, JJ., absent

An assignment in insolvency, made since the St. of 1880, c. 246, § 7, took effect, does not dissolve an attachment of the debtor's property made more than four months before the first publication of notice of the issuing of the warrant, although such notice was published before the enactment of the statute.

TRUSTEE PROCESS, dated February 5, 1878, and served on the trustee on February 8, 1878, who in his answer admitted funds of the defendant in his hands. On April 20, 1880, judgment was rendered in the Superior Court for the plaintiff against the defendant; but no judgment was entered as to the trustee, and no execution issued against the defendant. On May 8, 1880, the defendant applied for the benefit of the insolvent laws; the first publication of notice of issuing the warrant was made on May 10; and the assignment in insolvency was made on June 11. On October 16, the assignee in insolvency was admitted as a claimant of the funds in the hands of the trustee; and the question arose whether the plaintiff was entitled to the fund under the St. of 1880, c. 246, § 7, (which took effect on May 24, 1880,) or the claimant under the Gen. Sts. c. 118, §§ 19, 44. *Bazon*, J. allowed the claim of the claimant, and discharged the trustee; and the plaintiff alleged exceptions.

H. A. Dubuque, for the plaintiff.

M. Reed, (*D. V. Sullivan* with him,) for the claimant.

GRAY, C. J. An assignment in insolvency relates back to the date of the first publication of notice of the issuing of the

warrant, and has effect as of that time. *Clarke v. Minot*, 4 Met. 346. *Andrews v. Southwick*, 18 Met. 585. *Gallup v. Robinson*, 11 Gray, 20. *Butler v. Mullen*, 100 Mass. 453. But the extent of its operation depends on the law in force when the assignment is made. Attachments of the debtor's property are dissolved, not by the publication of notice, but by the assignment.

An assignment in insolvency, under the Gen. Sts. c. 118, § 44, dissolved all attachments existing at the time of the first publication of notice, without regard to the length of time they had been in force. But no assignment of this defendant's estate was ever made under those statutes, nor until after the St. of 1880, c. 246, § 7, had taken effect, which saves all attachments made more than four months before the commencement of the proceedings. No right to defeat the plaintiff's attachment had vested before the passage of this statute, and the effect of any assignment made since its passage is limited by its provisions. It was therefore erroneously ruled in the Superior Court that the plaintiff's attachment was dissolved.

Exceptions sustained.

ALBERT FRENCH *vs.* CITY OF BOSTON.

Bristol. Oct. 27. — Nov. 8, 1880. AMES & ENDICOTT, JJ., absent.

A city, which has the duty imposed upon it by statute of maintaining a bridge as a public highway, is not liable for an injury sustained by the owner of a vessel in consequence of a detention caused by the draw of the bridge being of less width than that prescribed by law, or for the carelessness of the superintendent of the bridge in delaying the vessel, unless such liability is expressly imposed by statute.

TORT for damages alleged to have been caused by the detention of the plaintiff's schooner by the superintendent of the draw in Warren Bridge. The case was submitted to the Superior Court, and, after judgment for the plaintiff, to this court on appeal, on an agreed statement of facts in substance as follows:

On February 27, 1879, the plaintiff, with his schooner, was in the waters of Charles River below Warren Bridge, loaded with coal to be landed at a wharf above the bridge, and had a tug-boat with him engaged to tow his schooner to the wharf. He applied to the superintendent of the bridge, having charge of the draw, to have the draw opened for him to pass with his schooner. The superintendent refused to open the draw, on the ground that the plaintiff's schooner was too wide to pass through the draw. The schooner was detained one day, during which time the draw was widened to thirty-six feet in the clear and the schooner then passed through the draw. Before this widening, the draw was thirty-five feet and eight inches in width. The plaintiff's schooner was thirty-five feet and eight inches wide, and had, with a cargo of railroad iron on board, been up and down through the draw in January 1878, and up in July 1878, without difficulty, but stuck therein when coming down in July 1878, and was got through with difficulty.

The care and management of Warren Bridge and draw were, by the St. of 1870, c. 303, § 5, vested in a board of commissioners, consisting of one person from the city of Boston and one person from the city of Charlestown, before which time the Commonwealth had assumed control of the bridge and draw, and had at different times collected tolls. The width of the draw is fixed by the St. of 1870, c. 401, at thirty-six feet. In pursuance of the provisions of these statutes, the court appointed commissioners, who awarded that the expense of maintaining the bridge be borne by the two cities equally, and their award was accepted and confirmed by the court on April 18, 1871. During the latter part of the year 1872, this board of commissioners entirely reconstructed the draw. In January 1874, Charlestown was annexed to Boston, and the care, management and maintenance of the bridge was imposed upon the city of Boston by the St. of 1874, c. 259, and, in the same year, a superintendent of the bridge was elected by the city council of Boston, whose duties are prescribed by certain city ordinances. The draw was, on February 27, 1879, of the same width as it was when the St. of 1874 went into effect.

If the plaintiff was entitled to recover, judgment was to be entered for him in the sum of \$89.75; otherwise, for the defendant

G. Marston, for the plaintiff.

H. B. Sargent, Jr., for the defendant.

MORTON, J. The St. of 1874, c. 259, imposes upon the city of Boston the duty of maintaining Warren Bridge as a public highway "at its own expense, and in accordance with such ordinances as the city council of said city may establish." The duty thus imposed upon the city is a public duty, from the performance of which it receives no profit or advantage. It is well settled in this Commonwealth, that no private action can be maintained against a city for the neglect to perform such a duty, unless it is expressly authorized by statute. *Hill v. Boston*, 122 Mass. 344, and cases cited. By statute, the city is liable to a traveller thereon for any defect in the highway of which the bridge is a part, but there is no statute which makes it liable to a private action for a failure to provide a draw of proper width, or for the carelessness of the superintendent of the bridge in delaying vessels which seek to pass through the draw. It follows that the plaintiff cannot maintain this action.

Judgment for the defendant.



BENJAMIN W. COLE vs. CITY OF NEWBURYPORT.

Essex. November 5, 1880. AMES & ENDICOTT, JJ., absent.

A city, which has for compensation granted the right to erect a booth on one of its public squares, for the use and exhibition of an animal, is not liable for an injury occasioned by the animal frightening a horse, while exercising upon the highway outside of the booth.

TORT. The declaration alleged that the owners of a certain animal, known as the Sacred Ox, were licensed by the defendant to erect a booth in a public square of the city, and to occupy the same for the use and exhibition of the said animal for the consideration of \$2.50 per day; that the ox then and there emitted an offensive odor in its nature obnoxious to horses and cattle, frightening them, and causing them to become unmanageable; that the ox was also of an uncouth and strange shape

and appearance, and was caparisoned in a gaudy and strange manner, so that he was an object of terror to horses and cattle: all of which the defendant well knew; that, while the owners of the ox were so licensed, the plaintiff, with his bread-cart and horse, was lawfully travelling upon the public highway, the horse being well broken and kind, and being driven by a safe and experienced driver, and when near the booth met the ox, which was being led back and forth for his usual exercise, which the defendant well knew; that the horse was then and there frightened by the said odor, and the said frightful appearance and caparison of the ox, and ran away, to the injury of the said horse and cart; that the plaintiff and his driver used due caution, but the defendant did not use due caution.

The defendant demurred to the declaration, assigning as cause of demurrer that it did not set forth a legal cause of action.

The Superior Court sustained the demurrer; and ordered judgment for the defendant. The plaintiff appealed to this court.

D. L. Withington & E. W. Cate, for the plaintiff.

D. Saunders & C. G. Saunders, for the defendant, were not called upon.

BY THE COURT. At the time of the accident, the ox was not in the place for the use of which the city received compensation, nor in the charge of any agent of the city; and the city is not responsible for the injury occasioned by the ox frightening the plaintiff's horse while both were travelling upon the highway. *Barber v. Roxbury*, 11 Allen, 818, 821. *Pierce v. New Bedford*, ante, 584. *Collingill v. Haverhill*, 128 Mass. 218.

Judgment affirmed.

CAPE ANN NATIONAL BANK *vs.* JOSEPH J. BURNS.

Essex. November 3. — 24, 1880. AMES & ENDICOTT, JJ., absent.

In an action upon a promissory note, the defendant's omission to deny his signature, as required by the St. of 1877, c. 163, does not prevent him, under a denial in his answer that he made the note, from contending that the note has been materially altered since he signed it, nor relieve the plaintiff from the burden of proving that the note remained in the same condition as when the signature was affixed.

The unauthorized alteration of a promissory note which is complete upon its face, and which has not been entrusted by the maker to any one for the purpose of being filled up or added to, does not make him liable to an action upon the note in its altered form.

CONTRACT upon the following promissory note: "Gloucester, Mass., Nov. 14, 1878. Four months after date I promise to pay to the order of H. Rosenberg one hundred and seventy-four dollars at Gloucester National Bank, value received.

\$174.

J. J. Burns."

The answer denied that the defendant made the note declared on, and denied that he signed the same.

At the trial in the Superior Court, before *Allen, J.*, the genuineness of the defendant's signature was expressly admitted; and the plaintiff produced the note and rested. The defence relied upon was that the note was fraudulently altered, after it was made, by the insertion of the words "one hundred and" before the words "seventy-four," and the insertion of a figure "1" before the figures "74."

The plaintiff contended that this defence was not open under the answer; but the judge ruled otherwise, and admitted evidence, against the plaintiff's exception, that, when the note was signed and delivered to the payee, it was a note for seventy-four dollars only. It was not disputed that the note was discounted by the plaintiff in the regular course of business, before maturity; and that it was then in its present condition, the plaintiff being a *bona fide* holder for value.

The plaintiff also contended that, upon the question of alteration, the burden of proof was upon the defendant; but the judge ruled otherwise, and instructed the jury that the burden was upon the plaintiff to prove that, when the note was signed and

delivered to the payee, it was in its present condition, to wit, a note for one hundred and seventy-four dollars, and that, unless the plaintiff established this fact by a fair preponderance of evidence, the defendant was entitled to a verdict.

The plaintiff further contended that, as the note was negotiated before maturity, the plaintiff would be entitled to a verdict, if the jury should be of opinion that the defendant negligently signed a note for seventy-four dollars, in such a condition, and with such opportunities for a fraudulent alteration, as to enable the payee to make such alteration in such manner as to show no indication to a careful observer that any such alteration had been made. But the judge ruled otherwise; and declined to submit any question to the jury except that of fraudulent alteration.

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

S. B. Ives, Jr., for the plaintiff.

C. P. Thompson, for the defendant.

GRAY, C. J. The defendant's omission to deny his signature, as required by the St. of 1877, c. 163, while it prevented him from denying the signature, did not prevent him, under the denial in the answer that he made the promissory note declared on, from insisting that the note had been materially altered since he signed it, nor relieve the plaintiff from the burden of proving that the note remained in the same condition as when the signature was affixed. *Lincoln v. Lincoln*, 12 Gray, 45. *Davis v. Travis*, 98 Mass. 222. *Simpson v. Davis*, 119 Mass. 269.

The unauthorized alteration of the note which was complete upon its face, and which had not been entrusted by the defendant to any one for the purpose of being filled up or added to, could not make him liable to an action upon the note in its altered form. *Angle v. Northwestern Ins. Co.* 92 U. S. 830. *Wade v. Withington*, 1 Allen, 561. *Greenfield Savings Bank v. Stowell*, 123 Mass. 196. *Goodman v. Eastman*, 4 N. H. 455. *McGrath v. Clark*, 56 N. Y. 84. *Holmes v. Trumper*, 22 Mich. 427.

Exceptions overruled.

NATHANIEL C. KING *vs.* JOSIAH BURNHAM.

Essex. November 5. — 24, 1880. AMES & ENDICOTT, JJ., absent.

The Superior Court has power, under its rules, upon petition of a party to an action pending therein, and after notice to the adverse party, to order the record of a former action between the same parties to be completed, and the judgment therein made up and entered; the judgment, when so recorded, takes effect from the date of the original judgment; and it is within the discretion of the court to allow the plaintiff in the pending action, in whose favor the original judgment was rendered, to file an amended declaration therein, counting upon that judgment.

CONTRACT. Writ dated February 4, 1879. The declaration, as originally filed, was upon a promissory note for \$180, dated September 3, 1863, signed by the defendant, and payable to the plaintiff or order. Answer, the statute of limitations. At March term 1880, the plaintiff was allowed to file an amended declaration upon a judgment recovered on October 19, 1869, by the plaintiff against the defendant, in the Superior Court of this county, in the sum of \$177.79, damages, and \$14.48, costs.

At the trial in the Superior Court, before *Gardner, J.*, without a jury, the plaintiff put in an authenticated copy of a record of a judgment obtained by the plaintiff against the defendant, as stated in the declaration, on default, upon a promissory note of like tenor with the one declared on in this action.

It appeared by the records of the court that the judgment in the former action was not made up or entered, for the reason that the note declared on was not filed in the clerk's office within six months after judgment was ordered; that, in June 1879, the plaintiff brought a petition under the rules of the Superior Court, copies of which are printed in the margin,* setting

* Rule 41 is as follows: "In order to enable the clerk to make up and complete his records within the time prescribed, it always shall be the duty of the prevailing party in every suit forthwith to file with the clerk all papers and documents necessary to enable him to make up and enter the judgment, and to complete the record of the case; and if the same are not so filed within six months after judgment shall have been ordered, the clerk shall make a memorandum of the fact on the record; and judgment shall not be afterwards recorded, unless, upon a petition to the court, and after

forth the facts in the former action, and the default of the defendant, and that the record in that action had not been completed on account of the note not having been filed with the clerk; and asking that the record might be fully completed and judgment made up and entered by the clerk on filing a copy of the note (the original being lost) with the clerk, first giving the bond required in such cases; that an order of notice, with the petition annexed, issued to the defendant by order of court, and was duly served on the defendant; and after hearing at December term 1879, the prayer of the petition was granted, a copy of the note was filed with the clerk, with a duly approved bond, and the record in the former action was completed and judgment made up and entered in the manner aforesaid; that, thereupon, the plaintiff moved for leave to file an amended declaration in this action, declaring on said judgment, which motion, after hearing, the court allowed.

The defendant asked the judge to rule that, at the time this action was begun, there was no judgment on which the plaintiff

notice to the adverse party, the court shall order it to be recorded. And no execution shall issue until the papers are filed as aforesaid. And when a judgment shall be recorded upon such petition, the clerk shall enter the same, together with the order of the court for recording it, among the records of the term in which the order is passed, with apt references in the index and book of records of the term in which the judgment was awarded, so that the same may be readily found; and the judgment, when so recorded, shall be, and be considered, in all respects, as a judgment of the term in which it was originally awarded. And the party delinquent in such case shall pay to the clerk the costs of recording the judgment anew, and also the costs of the petition, and the costs of the adverse party, if he shall attend to answer thereto."

Rule 42 is as follows: "Whereas, the clerks, in keeping their records in books, according to the ancient usage in this Commonwealth, do sometimes begin to enter a judgment before they have all the papers necessary to complete the same, and thereupon leave a blank in the books to be afterwards filled up; it is ordered, that no such blanks be suffered to remain for more than twelve months after the end of the term at which the judgment was rendered; and if the clerk, after beginning to enter a judgment as aforesaid, shall be prevented from completing the record for want of any necessary papers, as mentioned in the preceding rule, he shall make a memorandum of the fact, as above directed, in the blank space so left in the book, so that no one can afterwards interpolate the judgment therein."

could maintain an action; and that the plaintiff could not recover on his amended declaration. But the judge refused so to rule; and ordered judgment for the plaintiff. The defendant alleged exceptions.

E. L. Barney & H. M. Knowlton, for the defendant.

J. C. Sanborn, for the plaintiff.

GRAY, C. J. Under the rules of the Superior Court, the clerk indeed had no power, without a special order of the court, to make up and enter the judgment in the former action, unless the necessary papers were filed within six months after the judgment upon default. But the court had power, upon petition and after notice to the adverse party, to order the record to be completed, and the judgment made up and entered; and the judgment, when so recorded, took effect from the date of the original judgment. *Rugg v. Parker*, 7 Gray, 172. *Parker v. Rugg*, 9 Gray, 209. The present action having been commenced after that date, it was within the discretion of the court to allow the plaintiff to file an amended declaration therein, counting upon that judgment. Gen. Sts. c. 129, § 41. *Kendall v. Carland*, 5 Cush. 74. *Goodrich v. Bodurtha*, 6 Gray, 323.

Exceptions overruled.

HENRY R. HOPKINS vs. JAMES E. SHEPARD.

Essex. November 5. — 24, 1880. AMES & ENDICOTT, JJ., absent.

In an action upon a foreign judgment, the plaintiff is entitled, without alleging or proving any demand, to recover interest by way of damages upon the judgment sued on, from the date of that judgment to the date of the judgment in this action, computed at the ordinary legal rate of interest in this Commonwealth.

CONTRACT. The declaration was as follows: "And the plaintiff says that, by the consideration of the justices of the Supreme Judicial Court of the county of Kennebec, and State of Maine, at the August term thereof, A. D. 1866, to wit August 21, 1866, he recovered judgment against the defendant in the sum of \$218, debt or damage, and \$11.64, costs of suit, which judgment is in

full force and not impaired, annulled or satisfied: whereupon the plaintiff is entitled to have and recover of the defendant, by force of said judgment, the amount thereof and interest thereon."

At the trial in the Superior Court, before *Gardner*, J., without a jury, the plaintiff put in evidence a copy of the record of the judgment declared on; and evidence tending to show that the defendant in this action was the defendant in the action in which the judgment was rendered. No evidence was offered showing any law of Maine in regard to interest, or the rate of interest allowed by law in that State, if any, or whether interest is allowed in that State upon judgments; and no evidence was offered tending to show a demand for payment of the judgment declared on prior to the commencement of this action.

The defendant contended, and asked the judge to rule, that the plaintiff could not recover interest, except after a demand of payment of the judgment, and alleging such demand in his declaration; and that, therefore, upon the pleadings and evidence, interest could only be recovered from the date of the writ in this action. The judge declined so to rule; and found for the plaintiff, allowing interest at six per cent from the date of the judgment in Maine. The defendant alleged exceptions.

D. Saunders & C. G. Saunders, for the defendant.

C. P. Weston, for the plaintiff, moved for double costs.

GRAY, C. J. There can be no doubt that the plaintiff, under his declaration, and without proving any demand, is entitled to recover interest by way of damages upon the judgment sued on, from the date of that judgment to the date of judgment in this action, computed at the ordinary legal rate of interest in this Commonwealth. *Williams v. American Bank*, 4 Met. 317, 322. *Barringer v. King*, 5 Gray, 9. *Mahurin v. Bickford*, 6 N. H. 567. *Exceptions overruled, with double costs.*

INDEX.

ABORTION.

See TRIAL.

ACCEPTANCE.

See CONTRACT, 8; FRAUDS, STATUTE OF.

ACCESSORY.

See INDICTMENT, 4.

ACCOUNT STATED.

The answer to a declaration upon an account annexed alleged that the plaintiff and the defendant accounted together, and the items of the plaintiff's claim against the defendant were passed upon and the amount of the items adjusted and agreed upon, and that the moneys owing from the plaintiff to the defendant were agreed upon, and a certain sum agreed upon by the parties, on accounting together, as the balance found due to the plaintiff, and in full settlement to a date specified. *Held*, on demurrer, that the defence of *insimul computassent* was sufficiently pleaded. *Rand v. Wright*, 50.

ACTION.

1. The owner of a mill on a natural stream, who withholds or lets down water in excessive quantities, beyond what is incident to the necessary or reasonable use of his mill, is liable in an action of tort for injuries thereby caused to lands below on the same stream. *Clapp v. Herrick*, 292.
2. If a religious society gives notice of a meeting to be held at its house of worship, and invites the members of other societies to attend, a member of a church so invited, while on the land of the society, is not a mere licensee, and may maintain an action against the society for a personal injury sustained, while in the exercise of due care, from the dangerous condition of the defendant's premises. *Davis v. Central Congregational Society*, 867.

See BANK; CITY; CONTRACT, 1, 8; CORPORATION, 8; DEVISE AND LEGACY, 2; GAMING; GIFT, 2; INSANE PERSON; JUDGMENT; LANDLORD AND TENANT; MALICIOUS PROSECUTION; MASTER AND SERVANT; MONEY

HAD AND RECEIVED; MORTGAGE, 1, 2; NEGLIGENCE; PLEADING, 1, 2; PRINCIPAL AND AGENT, 1; RAILROAD, 4-6; TROVER; TRUST AND TRUSTEE, 2; WAY, 1.

ADMINISTRATOR.

See EXECUTOR AND ADMINISTRATOR.

ADOPTION.

A child adopted, with the consent of its father and the sanction of a judicial decree, in another State, where the parties are domiciled at the time, under a statute by which a child so adopted has the same rights of inheritance as legitimate offspring in the estate of the adopting father, is entitled, after the adopting father and the adopted child have removed their domicile into this Commonwealth, to inherit here the real estate of such father as against his collateral heirs; although his wife has given no formal consent to the adoption, as is required under the statutes of adoption of this Commonwealth. *Ross v. Ross*, 243.

See CONFLICT OF LAWS.

ADULTERY.

At the trial of an indictment for adultery, evidence of the reputation for chastity of the woman with whom the defendant is alleged to have committed adultery is competent. *Commonwealth v. Gray*, 474.

AGENT.

See PRINCIPAL AND AGENT.

AGREEMENT.

See CONTRACT.

ALTERATION OF INSTRUMENTS.

The unauthorized alteration of a promissory note which is complete upon its face, and which has not been entrusted by the maker to any one for the purpose of being filled up or added to, does not make him liable to an action upon the note in its altered form. *Cape Ann National Bank v. Burns*, 596.

AMENDMENT.

The Superior Court has power, under its rules, upon petition of a party to an action pending therein, and after notice to the adverse party, to order the record of a former action between the same parties to be completed, and the judgment therein made up and entered; the judgment, when so recorded, takes effect from the date of the original judgment; and it is within the discretion of the court to allow the plaintiff in the pending action, in whose favor the original judgment was rendered, to file an amended declaration therein, counting upon that judgment. *King v. Burnham*, 598.

ANIMAL.

See CITY, 2.

ANSWER.

See PLEADING, IV.

APPEAL.

1. No appeal lies to this court, under the Gen. Sts. c. 117, § 8, from a decree of the Probate Court, ordering that the account of an administrator be not allowed, because he has not charged himself with the amount due on a certain mortgage, but not ascertaining that amount, nor settling the account. *Cook v. Horton*, 527.
2. If the record, on which an appeal from a decree of a justice of this court, affirming a decree of the Probate Court, states a fact essential to the jurisdiction of the Probate Court, the appellant cannot contend in this court that the fact is otherwise, and move to dismiss the proceeding in the Probate Court. *Robinson v. Robinson*, 539.
3. The memorandum of a judge of the Superior Court, stating the grounds of his overruling a motion to set aside an award, is no part of the record; and the remedy of the party aggrieved is by bill of exceptions, and not by appeal. *Standish v. Old Colony Railroad*, 158.

ARBITRAMENT AND AWARD.

1. An agreement to submit to arbitration, the effect of which is to oust the courts of jurisdiction, is invalid. *Vass v. Wales*, 38.
2. An award made by three arbitrators, two of whom had prejudged the case on *ex parte* testimony, is not binding upon a party to the submission to arbitration, especially if no notice of any meeting of the three is given to him. *Hills v. Home Ins. Co.* 345.
3. If a person agrees with another to pay for an article if it accomplishes a particular result, the test to be made by a third person, the decision of the latter is in the nature of an award, and evidence is inadmissible to show that his decision was erroneous. *Robbins v. Clark*, 145.

See APPEAL, 3; EQUITY, 7.

ARREST.

See POOR DEBTOR, 1-8.

ARREST OF JUDGMENT.

See INDICTMENT, 3.

ASSENT.

See PRINCIPAL AND AGENT, 2.

ASSESSMENT.

See CORPORATION, 1.

ASSESSOR.

See TRUSTEE PROCESS.

ASSIGNMENT.

A voluntary assignment by a debtor in another State of all his property situated in this Commonwealth, in trust for his creditors, the only consideration for which is the acceptance of the trust by the assignee, although valid in the State where made, is invalid as against a subsequent attachment of his personal property by a creditor in this Commonwealth not assenting to the assignment; and a subsequent assent to the assignment by creditors in the other State, by proving their claims under it, cannot defeat the title acquired by the attachment here. *Pierce v. O'Brien*, 814.

See MORTGAGE, 6; PLEADING, 2; SET-OFF, 2.

ASSUMPSIT.

See CONTRACT, 7.

ATTACHMENT.

1. In an action against an officer for the attachment of the plaintiff's goods on a writ against a third person, there was evidence that the officer went to a carrier, in whose custody the goods were, and told him he had come to attach the goods; that, on the carrier refusing to deliver the goods to any one until the freight was paid, the officer went away; that afterwards, on being told that the goods belonged to the plaintiff, he said nothing except to refer his informant to the attorney who made the writ; and that his return on the writ stated that he had attached the goods. *Held*, that the defendant had no ground of exception to a refusal to rule that there was no evidence of an attachment. *Stearns v. Dean*, 189.
2. Land conveyed to a single woman was, after her marriage, attached in an action against her by her maiden name, the creditor being ignorant of the marriage. Judgment was afterwards recovered against her by the same name, and the land was sold on execution. After the attachment and before judgment, the woman, by her married name, and adding her former name, mortgaged the same land to a person who had no actual notice of the attachment. *Held*, that the attachment took precedence of the mortgage. *Held, also*, that the fact that, after her marriage and before the attachment, she made a conveyance of land in the same county by her married name, was not constructive notice to the attaching creditor of the marriage. *Cleveland v. Boston Five Cents Savings Bank*, 27.
3. The Gen. Sts. c. 123, §§ 87, 88, providing that personal property, which has been attached in a suit against one part-owner, shall, at the request of the other part-owner, be appraised and delivered to him upon his giving

bond to the attaching officer, do not apply to an attachment of partnership property in an action against one partner. *Breck v. Blair*, 127.

4. An assignment in insolvency, made since the St. of 1880, c. 246, § 7, took effect, does not dissolve an attachment of the debtor's property made more than four months before the first publication of notice of the issuing of the warrant, although such notice was published before the enactment of the statute. *O'Neil v. Harrington*, 591.

See ASSIGNMENT; BANKRUPT, 1, 8; BOND, 2; CORPORATION, 4; DEED, 2; EXECUTION, 2.

ATTORNEY.

See BANK.

AUDITOR.

Where an auditor's report in favor of one party states particular facts from which a conclusion in favor of either party may be inferred, the jury, from those facts, without other evidence, may give a verdict against the conclusion of the auditor. *Emerson v. Patch*, 299.

See REMOVAL OF ACTION, 2.

AUTREFOIS ACQUIT OR CONVICT.

Neither the judgment of a magistrate, upon a complaint of which he has concurrent jurisdiction with the Superior Court, that the defendant be discharged for want of probable cause to believe him guilty, nor his judgment that there is probable cause to believe the defendant guilty, and that he recognize for his appearance in the Superior Court, can be pleaded in bar to a subsequent indictment for the same offence. *Commonwealth v. Hamilton*, 479.

BANK.

The owner of a negotiable promissory note, indorsed in blank by the payee, handed it to an attorney at law for collection. The attorney deposited it in a bank for collection, without stating for whose account. The bank collected it, credited the attorney with it, and applied the amount standing to his credit in part payment of the debt of the attorney to the bank. The attorney was subsequently adjudged a bankrupt, and the bank made a settlement with his assignees, in which the amount of the note was included. The owner of the note, a year after the settlement, but as soon as he knew that the bank had collected the note, made a demand upon the bank for the proceeds of the note. *Held*, that he could not maintain an action therefor against the bank. *Wood v. Boylston National Bank*, 858.

See CORPORATION, 8; PROMISSORY NOTE, 6; SAVINGS BANK.

BANKRUPT.

1. An attachment of property of a debtor, made within four months of the commencement of proceedings in bankruptcy, is dissolved by a conveyance

- by the bankrupt of his estate to trustees, under the U. S. Rev. Sts. § 5103, and, in an action by the attaching creditor to enforce his claim, in which judgment is rendered for the defendant on his discharge in bankruptcy, the trustees are entitled to judgment for their costs. *Moors v. Albro*, 9.
2. An absolute deed of land with a contemporaneous, though unrecorded, agreement of defeasance, is, in equity at least, a mortgage, as between the grantor and the grantee, leaving an equity of redemption in the former, which vests in his trustees in bankruptcy, under the U. S. Rev. Sts. § 5103; and the fact that the deed is recorded, and the agreement of defeasance is not recorded, does not create any estoppel of which an attaching creditor of the bankrupt can avail himself. *Ib.*
 3. An action against an officer for a conversion of the plaintiff's property, by attaching it on a writ against a third person, is barred by a discharge in bankruptcy obtained subsequently to the attachment, although the effect is to exonerate the sureties on his official bond from liability for his misfeasance. *Hayes v. Nash*, 62.
 4. A composition in bankruptcy, under the U. S. St. of June 22, 1874, § 17, does not bind a creditor, whose debt is stated at less than its true amount in the statement of the debtor, if the creditor does not join in the resolution of composition, or accept any money under it, and objects to its being recorded. *Hewes v. Rand*, 519.
 5. Land was leased by a trustee, and the lessee covenanted with him to pay rent and taxes. The trustee directed the lessee to pay the rent to the *cestui que trust*. The lessee subsequently went into bankruptcy, and entered into a composition with his creditors, under the U. S. St. of June 22, 1874, § 17. His schedule of the debts stated the amount due for rent and the name and address of the *cestui que trust*, but not the amount due for taxes, nor the name and address of the trustee. Neither the trustee nor the *cestui que trust* took any part in the proceedings for composition. Held, in an action by the trustee for the rent and taxes due at the time of the bankruptcy, that the composition was not a bar. *MacMahon v. Jacobs*, 524, note.
 6. If a resolution of composition, under the U. S. St. of June 22, 1874, § 17, has been signed by the requisite majority of creditors, and the debtor's assent to its terms has been manifested by his signature to the petition by which the proceedings for a composition were initiated, and the court has adjudged that the resolution has been duly passed, and has ordered it to be recorded, its operation cannot be impeached collaterally, in an action at law, by a creditor who would otherwise be bound by it, on the ground that it was not confirmed by the signature of the debtor. *Home National Bank v. Carpenter*, 1.
 7. A composition in bankruptcy, under the U. S. St. of June 22, 1874, § 17, cannot be impeached collaterally in an action at law in a state court, by a single creditor who was a party to the proceedings, by showing that the composition was obtained by fraudulent acts of the bankrupt. *Farwell v. Raddin*, 7.
 8. In order to give effect to a composition under the U. S. St. of June 22, 1874, § 17, it is not necessary that the debtor should make a tender to

every creditor of the amount due him under the composition; but it is sufficient that such notice of his readiness to pay that amount be given to each creditor as may enable him to demand it at a reasonable place, and at the time when it is payable by the terms of the composition. *Home National Bank v. Carpenter*, 1.

See BANK; CORPORATION, 3; PLEADING, 2; PROMISSORY NOTE, 5.

BENEVOLENT SOCIETY.

See TAX, 8.

BETTERMENT.

See TAX, 4.

BOND.

1. Under the Gen. Sts. c. 57, §§ 137, 138, providing that the trustees of a savings bank shall be chosen annually, and shall appoint a treasurer who shall hold office during their pleasure, the office of the treasurer is not an annual one; and a bond given by him for the faithful performance of the duties of his office "while he acts as treasurer" is a continuing bond. *Commonwealth v. Reading Savings Bank*, 73.
2. Upon a bond given under the St. of 1877, c. 97, by a person having an interest in money or credits attached by trustee process, to dissolve such attachment, with condition to pay to the plaintiff the sum for which the trustee may be charged, if any, within thirty days after final judgment, no action can be maintained, if the trustee has been discharged in the trustee process. *Porter v. Giles*, 589.

See CONSTABLE; EXECUTOR AND ADMINISTRATOR, 1; INSOLVENT ESTATE; PRINCIPAL AND SURETY · PROMISSORY NOTE, 3, 4; TRUST AND TRUSTEE, 1.

BOUNDARY.

See DEED, 4, 5; EVIDENCE, 8.

BREACH OF PROMISE OF MARRIAGE.

1. It is no defence to an action for breach of a contract to marry, that the defendant broke the contract because he felt that the proposed marriage would not tend to the happiness of both parties. *Coolidge v. Neat*, 146.
2. In an action by a woman for breach of a promise of marriage, the judge instructed the jury that, in estimating the damages, they might take into consideration the money value or worldly advantage of a marriage which would have given her a permanent home and an advantageous establishment, the wound and injury to her affections, whatever mortification or distress of mind she suffered resulting from the defendant's refusal to perform his promise, and, in this connection, the length of time during which the engagement had subsisted. *Held*, that the defendant had no ground of exception. *Ib.*

BREAKING AND ENTERING.

See INDICTMENT, 2.

BRIDGE.

See CITY, 1.

BURDEN OF PROOF.

See PLEADING, 5; WAY, 2.

BY-LAW.

See CORPORATION, 3.

CARRIER.

See ATTACHMENT, 1; TROVER.

CASE STATED.

A writ of entry against a mortgagee of land, to which the plea was *nil disseisin*, was submitted to the court on agreed facts, which set forth the respective titles of the parties and stated that the mortgagee had never taken possession of the demanded premises, although there had been a breach of condition. *Held*, that, if the demandant had the better title, he was entitled to judgment. *Cleveland v. Boston Five Cents Savings Bank*, 27.

CHARITY.

See DEVISE AND LEGACY, 8.

CITY.

1. A city, which has the duty imposed upon it by statute of maintaining a bridge as a public highway, is not liable for an injury sustained by the owner of a vessel in consequence of a detention caused by the draw of the bridge being of less width than that prescribed by law, or for the carelessness of the superintendent of the bridge in delaying the vessel, unless such liability is expressly imposed by statute. *French v. Boston*, 592.
2. A city, which has for compensation granted the right to erect a booth on one of its public squares, for the use and exhibition of an animal, is not liable for an injury occasioned by the animal frightening a horse, while exercising upon the highway outside of the booth. *Cole v. Newburyport*, 594.

See DEVISE AND LEGACY, 8; ESTOPPEL, 2; WAY.

CLOUD UPON TITLE.

See EQUITY, 1.

CODICIL.

See DEVISE AND LEGACY, 5, 7.

COLLATERAL SECURITY.

See MORTGAGE, 6.

COMPLAINT.

See AUTREFOIS ACQUIT OR CONVICT; INTOXICATING LIQUORS, 1.

COMPOSITION.

See BANKRUPT, 4-8.

COMPROMISE.

See EQUITY, 8.

CONDITION.

See DEED, 6, 7.

CONFLICT OF LAWS.

The status of any person, with the inherent capacity of succession or inheritance, is to be ascertained by the law of the domicile which creates the status, at least when the status is one which may exist under the laws of the State in which it is called in question, and when there is nothing in those laws to prevent giving full effect to the status and capacity acquired in the State of the domicile. *Ross v. Ross*, 248.

See ADOPTION; ASSIGNMENT.

CONSIDERATION.

See CONTRACT, II.

CONSTABLE.

The refusal of a constable to restore attached property to the owner, upon the termination of the action in the latter's favor, is a breach of the condition of his official bond that he shall "faithfully perform all the duties of a constable in the service of all civil processes which may be committed to him;" a judgment against him for the conversion of the property is conclusive upon him and his sureties in an action on the bond; and it is immaterial that, in the action against him, he is not described in his official capacity. *Dennie v. Smith*, 148.

CONSTITUTIONAL LAW.

1. The St. of 1878, c. 261, allowing a person indebted to a savings bank, in a proceeding for the collection of the debt, to set off the amount of a deposit

- held and owned by him at the commencement of such proceeding, is constitutional. *North Bridgewater Savings Bank v. Soule*, 528.
2. After a decision of this court that a tax sale of real estate was void on account of a defect in the notice thereof, a statute was passed enacting that no such sale previously made should be held to be invalid by reason of such defect, provided that the act should not apply to any case wherein proceedings at law or in equity had been begun involving the validity of such sale, nor to any real estate which had been alienated between a certain date (which was the date of the decision) and the passage of the act. *Held*, that the statute was unconstitutional. *Forster v. Forster*, 559.
 3. Section 5 of the Gen. Sts. c. 78, providing that "no person shall cause or permit to be driven or floated down Connecticut River, any masts, spars, logs or other timber, unless the same are formed and bound into rafts and placed under the care of a sufficient number of persons to govern and manage the same so as to prevent damage thereby," is constitutional, even in the case of logs coming from one State and passing through this Commonwealth on their way to another State. *Harrigan v. Connecticut River Lumber Co.* 580.

CONTRACT.

I. Making.

1. If A. sells goods to B., who sells them to C., the fact that A. supposed he was selling the goods to C. through B. as his agent, and would not have sold them to B. on his sole credit, will not entitle A. to maintain an action against C. for the conversion of the goods. *Stoddard v. Ham*, 383.
- See INSANE PERSON; PRINCIPAL AND AGENT, 2; TRUST AND TRUSTEE, 2.

II. Consideration.

2. Part payment of a debt, after its maturity, is not a sufficient consideration for a discharge, not under seal, of the remainder. *Lathrop v. Page*, 19.
3. The acceptance of a lease containing a covenant that the lessee will give up the demised premises to the lessor at the end of the term in as good order and condition "as the same now are or may be put into by the lessor," is a sufficient consideration for an agreement, executed and delivered by the lessor contemporaneously with the lease, which refers in terms to the lease, and in which the lessor binds himself to make forthwith certain repairs upon the premises. *Vass v. Wales*, 38.

III. Validity.

See ARBITRAMENT AND AWARD, 1; EMBEZZLEMENT, 3; EQUITY, 2.

IV. Construction.

1. In an action by the executor of C. against the indorser of a promissory note, it appeared that, before the maturity of the note, the plaintiff and the defendant executed an indenture, which recited that there had been a partnership between the defendant and C., which was dissolved by the

death of C., and that an arrangement had been made by which the plaintiff, as executor of C., was to take all the property of the partnership and pay all its debts and liabilities, and also to release the defendant from all sums "which he may be owing said copartnership, amounting to \$6000 more or less;" and by which the defendant assigned all the stock of goods, securities, debts and effects, in which he had any right by virtue of the copartnership, and all his interest therein, to the plaintiff, with full power to sue for, receive and collect the same; and the plaintiff covenanted that he would pay and discharge all the debts of the firm and would indemnify and hold the defendant harmless therefrom, and "doth hereby release and forever discharge" the defendant "from any and all sums which he is individually indebted to said partnership and to the estate of said C., being \$6000 more or less." *Held*, that the indenture applied to such debts only as were due from the defendant to the former partnership; and that, it not appearing that the note in suit was a partnership transaction, it was not affected by the release. *Lathrop v. Page*, 19.

5. An agreement, executed and delivered by a lessor contemporaneously with a lease of certain greenhouses, recited that the boiler and heating apparatus were not in satisfactory order, and other small repairs were needed in and upon the houses; and, in consideration of the lease, the lessor agreed to put the boilers and heating apparatus in good working order, to furnish the lumber required to repair the benches, and to put the houses "generally in good working order." *Held*, that he was required to do only the work in and upon the greenhouses themselves, necessary to put them in good order; and not to place guards on the roof of an adjacent building on the demised premises to protect the greenhouses from snow and ice which might slide from that roof. *Vass v. Wales*, 38.
6. A contract for the erection of a building provided that the work should be done in all respects according to the plan and specifications which had been furnished by the architect. One clause in the specifications required "all walls to be vaulted." By the plan, the walls of the building appeared to be sixteen inches in width, without the appearance of any vault or space intended to be left in them. *Held*, that, by the contract, the walls were to be only sixteen inches including the vault; and that parol evidence was inadmissible to explain the contract. *Smith v. Flanders*, 322.
7. The grantee in a deed, containing a stipulation that the land is subject to a mortgage which he assumes and agrees to pay, is liable to the grantor, who pays the mortgage after failure of the grantee to pay it, although the grantor, when he pays the mortgage, takes an assignment of it; and, in an action for the amount so paid, evidence is inadmissible that, at the time the mortgage was made, the grantor held the land in trust for the grantee and others, and the mortgage was given to take up the defendant's share of a previous mortgage. *Lappen v. Gill*, 349.

See PROMISSORY NOTE, 1.

V. Rescinding.

8. A contract, the duration of which is not fixed, to pay a reasonable compensation for the board, tuition and clothing of a person whom the promisor

is not bound to support, is terminated by the death of the promisor; and an action cannot be maintained against his executor for anything subsequently furnished, although the executor has not given notice of the death. *Browne v. McDonald*, 66.

See DAMAGES.

CONVERSION.

See CONTRACT, 1; CORPORATION, 3.

CORPORATION.

1. A statute enacted that four persons named "are hereby made a corporation," and fixed the capital stock at \$50,000, with liberty to increase it by vote of the corporation to \$150,000. The persons named in the statute met, organized by the choice of a chairman and clerk, accepted the act of incorporation, appointed a committee to receive subscriptions, and voted that, when subscriptions were received to the amount of \$50,000, the clerk should call a meeting of the subscribers. A subscription paper was drawn up reciting the act of incorporation, stating the capital stock to be \$50,000, that the signers associated themselves together to form said corporation, and agreed with the corporation to take the number of shares affixed to their respective names, and to pay therefor \$100 a share at such times as should be determined on the organization of the corporation. The paper was signed by a number of persons, and the number of shares set opposite their names represented nearly \$100,000. At a meeting of the subscribers, a committee appointed for the purpose reported the names of fourteen persons whose subscriptions aggregated \$50,000. These names were taken promiscuously, and not in the order of their subscriptions. By-laws were then adopted. On the motion of a subscriber, not one of the fourteen, the capital stock was increased to \$100,000; all the subscribers were admitted with the rights and privileges of stockholders; directors were chosen, and an assessment was levied on the capital stock, which was paid. At a subsequent meeting another assessment was levied. *Held*, in an action against one of the fourteen persons whose names were reported by the committee as above stated, to recover his proportion of this assessment, that the corporation was never legally organized, and that the action could not be maintained. *Katama Land Co. v. Holley*, 540.
2. A railroad corporation, created by the laws of another State which has an office in this Commonwealth for the convenience of its stockholders and for the better management of its finances and other business, where its principal officers are to be found, and where it carries on such business as is usually carried on in the office of the president and treasurer of a railroad corporation, has a usual place of business in this Commonwealth, within the meaning of the St. of 1870, c. 194, and may be summoned as trustee by process served upon its treasurer. *National Bank of Commerce v. Huntington*, 444.

8. The owner of shares of stock in a national banking association delivered his certificate of stock, together with a power of attorney to transfer the same, to secure his promissory note; and, more than four months afterwards, became a bankrupt, and an assignee in bankruptcy was appointed. Subsequently, the note being due and unpaid, the payee, after notice to the bankrupt and his assignee, sold the stock by public auction, under the Gen. Sts. c. 151, § 9. The assignee subsequently demanded of the bank a transfer of the stock to himself, but the bank refused, and afterwards transferred the stock to the purchaser at the sale. The by-laws of the bank provided that its stock should be assignable only on its books, subject to the restrictions and provisions of the U. S. Rev. Sts. § 5139, and a transfer book should be kept, in which all assignments and transfers of stock should be made; and that, when stock was transferred, the certificates thereof should be returned to the bank and cancelled, and new certificates issued. *Held*, that the assignee could not maintain an action against the bank for the conversion of the stock. *Held, also*, that evidence that it was agreed, at the time of the original delivery of the certificate and power of attorney, to keep the transaction secret, in order that the transferrer, who was a director of the bank, might obtain a false credit at the bank, was inadmissible, in the absence of proof that the bank had knowledge or notice of such agreement. *Dickinson v. Central National Bank*, 279.
4. A sale of stock in a corporation is valid against a subsequent attaching creditor of the seller, although no transfer of the stock is made on the books of the corporation, in the absence of an express provision of statute, or of the charter of the corporation, requiring such transfer to be made. *Boston Music Hall v. Cory*, 435.

See EQUITY, 6, 7, 14; MASTER AND SERVANT, 3-5; NEGLIGENCE, 1; RAILROAD.

COSTS.

A landowner, who has applied, under the St. of 1873, c. 261, to the Superior Court for a jury to assess his damages sustained by a change of grade of a highway, and has obtained a verdict in his favor, is not entitled to costs. *Gifford v. Dartmouth*, 135.

See BANKRUPT, 1; EQUITY, 14; FLATS; POOR DEBTOR, 1.

COUPON.

See PROMISSORY NOTE, 3, 4.

COURT.

See PROBATE COURT; SUPERIOR COURT; SUPREME JUDICIAL COURT.

COURT OF INSOLVENCY.

See INSOLVENT DEBTOR, 2, 3; RECORD.

COVENANT.

See DEED, 8.

DAMAGES.

If A. contracts with B. to do certain work, and makes a sub-contract with C. for certain materials which B. by his contract with A. is required to furnish, and, after C. has begun to make the materials, the contract is abandoned by A., the liability of B. to C. for loss of materials and profits is a proper element of damage in an action by B. against A. *Smith v. Flanders*, 322.

See BREACH OF PROMISE, 2; DOWER; PRINCIPAL AND SURETY, 1.

DEATH.

See CONTRACT, 8; INSURANCE, 1.

DEED.

1. A mere reference to a plan, in the descriptive part of a deed of a lot of land, does not import a stipulation by the grantor that the plan shall not, in any respect, be subsequently changed in parts not adjacent to the land sold. *Coolidge v. Dexter*, 167.
2. A. conveyed a parcel of land to B., and B., as part of the same transaction, reconveyed the land to A. The first deed was at once recorded, but the second deed was not recorded until some months afterwards, it being the intention of the parties that it should not be recorded, in order that the record title should be in B. *Held*, that a creditor of B., without notice of the unrecorded deed, could attach the land as his property. *Woodward v. Sartwell*, 210.
3. The owner of a parcel of land granted by deed, duly recorded, to A. a part of the land, and a right to maintain a dam on the rest; and afterwards conveyed to a third person the whole parcel, "reserving" all the rights of A., his heirs and assigns, therein. *Held*, that this created an exception, and not a reservation; and that the second grantee could not maintain an action against his grantor on the covenant of seisin in his deed. *Stockwell v. Couillard*, 231.
4. A passageway was laid out in the rear of lots of land which fronted on two streets, and ran in an easterly direction to another street, called S. Street; and it was subsequently extended by other owners of land in a westerly direction to the land of a third person. After this the owner of a lot of land, the rear of which was bounded partly by the passageway as first laid out, and partly by the passageway as extended, conveyed the lot, bounding it on the "passageway which runs to S. Street, with a right to the free use in common with others having rights therein of the said passageway leading to S. Street." *Held*, that the grantee had a right of way only to S. Street, and had no rights in the extended passageway westerly

of his land, even if his grantor had rights therein at the time of the conveyance. *Langmaid v. Higgins*, 353.

5. The owner of a large tract of land divided it into lots, shown on a plan, and conveyed one lot, rectangular in shape, bounding it beginning at a certain distance from the westerly corner of a fence around a distant lot, and thence by a line running around the lot conveyed, the courses and distances of which were given. The deed also contained a condition that the front line of the house should be a certain distance from the street on which it bounded; a condition that the house should occupy the entire width of the lot; and a recital that the house then on the lot was in compliance with these conditions. An adjoining lot was conveyed to the same person by a deed containing a similar description, and similar conditions and recitals. The grantee then conveyed the first lot, using the same description as in the deed to him. *Held*, that his grantee had title to the centre of the partition wall between the two estates, even though the effect of measuring from the fence of the distant lot would be to place the whole of the partition wall in the second lot. *Sanborn v. Rice*, 387.
6. A lot of land twenty-one feet wide was conveyed subject to the condition that the front line of the building should be fifteen feet from the street on which the land bounded, and the deed recited that the building then on the land conformed to the condition. The front line of the building thus referred to was straight. Subsequently the owner built a rectangular addition to the front, eight or nine feet wide and projecting three feet and three inches towards the street. This structure began four feet above the ground and extended to the top of the building. *Held*, that there was a violation of the condition. *Id.*
7. A deed of a lot of land, bounded on a street, contained a condition that "no dwelling-house or other building shall be erected on the rear of said lot." The deed also stated that the building then on the land conformed to the condition. *Held*, that there was no ambiguity as to what was meant by the rear of the lot, although the same condition had been inserted in an agreement for a deed made when the land was vacant. *Id.*

See CONTRACT, 7; ESTOPPEL, 1; EVIDENCE, 6; EXECUTION, 2; INDIANS; PRINCIPAL AND AGENT, 2.

DEMAND.

See INTEREST, 3.

DEMURRER.

See EQUITY, 10; PLEADING, 3.

DEVIATION.

See PLEADING, 4.

DEVISE AND LEGACY.

1. A testator, by the first clause of his will, of which he appointed his wife executrix, gave to her all his personal property, and, by the second clause, he gave to her all the income of his real estate during her lifetime, "and, at her decease, the property remaining to be divided equally" among his children. *Held*, that the widow took the personal property absolutely as legatee, and, there being no creditors of the estate, she had the right to pay and appropriate it to herself. *McKim v. Harwood*, 75.
2. A testatrix, whose property consisted principally of land, devised to one of her three daughters, "her heirs and assigns," one third of the residue of her estate, "provided, however, that there shall be set apart from her share" a certain legacy to each of her children, to be kept at interest "until the youngest child becomes twenty-one years of age, the interest meanwhile to be paid to said legatees specifically." The will contained similar provisions for the other daughters and their children. *Held*, that the legacies to the grandchildren were a charge upon each parent's share; and that an action would not lie against the executor therefor. *Frampton v. Blume*, 152.
3. A testator, by his will, gave an equitable life estate in one fourth part of the residue of his estate to each of his two surviving sons with a limitation over to his issue, a life estate in one fourth to the children of his deceased son H. with a like limitation over to their issue, and a life estate in the remaining fourth to his daughter S. with a limitation of a life estate to her children and a further limitation over to her grandchildren. He then provided as follows: "And if either of my said children shall die without children or grandchildren, I direct the share of income of such child or children to be paid to my surviving child or children and to the children of my son H. in the manner above provided during the natural life or lives of such surviving child or children and grandchildren. It is my intention that my grandchildren shall take by representation, and, on the failure of issue of either of my children, the share of such child shall vest in the issue of my surviving children and the issue of my son H., and be paid whenever the same is distributable agreeably to the provisions of this will." The testator's son W. died without issue. Before the death of W., the other son of the testator and his daughter S. had died, each leaving issue. *Held*, that the income of W.'s share should be divided equally among the issue of each of the testator's three children who left issue. *Minot v. Taylor*, 160.
4. A testator devised the residue of his estate to a trustee upon the following trusts: "In case my daughter shall be left a widow, to pay over to her, during her widowhood, all the interest on such sums as may be in his hands at the time she shall become a widow; and in case my said daughter shall leave any child or children, the amount in said trustee's hands shall be paid over to such child or children at their maturity, or when of full age of twenty-one years;" in case she should leave no child or children, the trustee was to pay over the amount in his hands to the testator's brother. The daughter survived the testator, and died leaving a husband

and two children, one of whom subsequently died unmarried before either child came of age. *Held*, that the grandchildren took interests in the nature of remainders, which vested in them at least upon the death of their mother; and that the interest of the child who died passed upon his death to his father as his heir. *Teele v. Hathaway*, 164.

5. A widower devised the residue of his estate to his brother, in trust, to take from the income what he should deem necessary for the support and education of the testator's only son during his minority; to add the excess of income over the sum expended to the principal of the fund; and, upon the son's coming of age, to pay over to him, for his own use, one half of the principal with accumulations, the other half to be held in trust to pay over the entire income to the son during his life, and, at his death leaving issue, to transfer the principal to such issue as he should by will direct, or, in default of such issue, to the son's children in equal shares; in case of the son's death before coming of age, or of his subsequent death leaving no issue, the property then held in trust was to go to the trustee. The testator subsequently made a codicil to his will, which, after reciting that he was about to marry C., and making provision for her, proceeded as follows: "In case I shall leave any child, or children, or posthumous child, born of C., then, and in such case, I give to each and every such child the sum of \$250,000, the same to be held in trust by my brother until such child attains the age of twenty-one years, and if daughter or daughters, the same is to be held in trust so long as they shall live, and the income only to be paid to them for their own sole and separate use, and if son or sons, one half, with the accumulated income, to be paid over to them, and the other half to be held in trust, on the same terms as the property I have left my son in my will." *Held*, that the reference to the will in the codicil governed the provisions for daughters as well as those relating to sons; that the trustee could devote such portion of the income as was needed for the support and education of a daughter during her minority; that the residue should be added to the principal; that, after a daughter came of age, she was not entitled to any portion of the accumulated income, or to have the trust terminated, but only to the income during life of the principal and accumulated income, with a power of disposal by will among her issue, if any. *Thayer v. Thayer*, 189.
6. A testator devised certain real estate to trustees in trust to pay the income thereof to his daughter N. during her life; on her decease, to pay the income of a certain portion of such estate to her daughters A. and M. during their lives, and upon their decease, to convey "said estate" in fee to the heirs at law of A. and M.; upon the decease of N., to pay the income of the remaining portion of the estate "to her children" during their lives, "and as the children of N. successively decease," said remaining portion was "to be conveyed in fee to the heirs at law of all the children of N." At the death of the testator, N. was fifty-five years of age, and had children living. *Held*, that the devise of life estates to the children of N. included children born after the death of the testator; and, it being conceded that, if such was the case, the limitation over to the heirs of such children was void for remoteness, that the estate thus limited passed under the residuary

clause of the will, which devised "all the rest, residue and remainder of my estate, real and personal, of every nature and description," although certain other remainders and reversions were therein specified as coming within this general description. *Lovering v. Lovering*, 97.

7. A testator devised his estate to trustees, in trust to pay the income of \$4000 to his son for life; to his son's wife for life, if she should survive him; and, on their death, the income and principal to go with the residue of his estate. The will also contained many provisions for the income of different portions of his estate, and included in the remainder "the income of any of the foregoing principal sums that may lapse thereinto." By a codicil, which recited that he had given his son the income of \$4000 for life, he declared that he altered the legacy by adding to the same the income of \$2000 additional "to be paid in the same way and manner." By a subsequent codicil he directed his trustees to pay the income of \$4000, in addition to the income of \$8000, to his son, "so that he shall have the income of \$10,000 during his life; the principal sum on his decease to lapse into the residue of my estate." *Held*, that the bequest to the wife of his son was revoked by this codicil. *Crafts v. Hunnewell*, 220.
8. A testator bequeathed a sum of money in trust for the establishment of a school in a city, and appointed certain persons named and the "mayor of the city" a board of trustees to carry into effect the provisions of the will. A codicil provided that the fund was to be paid over to the city for educational purposes, if two thirds of the trustees should be of opinion that they could not administer it as the testator intended. *Held*, that, while the trustees held the fund, the city took no interest in it; and that the person who was the "mayor of the city" at the time of the testator's death, and not the mayor at the time the trustees were appointed, was entitled to be appointed a trustee. *Dunbar v. Soule*, 284.
9. A devise of so much of the testator's estate as may be sufficient for the maintenance of the devisee during his life, "he having full power to sell and convey any and all of my real estate, at any time, if necessary to secure such maintenance," does not give to the devisee the right to mortgage the estate in fee. *Hoyt v. Jaques*, 286.
10. A., whose only property consisted of an equitable estate for life in land, with a power to appoint in fee by will, made an oral agreement with B. by which he agreed that, if B. would take care of him during his life and bury him, B. should have all his property at his death. A. made a will by which, after directing the payment of his just debts and funeral charges, he devised all his property to B., and appointed him his executor. *Held*, that the charges of administration, the funeral expenses and debts due from the estate were charges upon the land, to be paid before B.'s claim for services rendered in pursuance of the agreement. *O'Donnell v. Barbey*, 453.

See EQUITY, 5, 8, 17; TRUST AND TRUSTEE, 1.

DISCHARGE.

See CONTRACT, 2.

DIVORCE.

A wife who has appeared in a suit for divorce brought by her husband against her in another State, in which a decree is rendered in his favor, and who subsequently executes a release reciting the divorce therein obtained, and for a pecuniary consideration discharging all her claims against him and his estate, cannot, after his subsequent marriage and cohabitation with another woman, maintain a libel for divorce therefor against him in this State, on the ground that the court in the other State had no jurisdiction of his libel, without proving that he went to that State for the purpose of procuring a divorce. *Loud v. Loud*, 14.

DOMICIL.

See ADOPTION; CONFLICT OF LAWS; HUSBAND AND WIFE.

DONATIO MORTIS CAUSA.

See GIFT; PLEADING, 1

DOWER.

Under the Gen. Sts. c. 185, damages for the detention of dower cannot be recovered prior to the demand on which the action is founded. *Whitaker v. Greer*, 417.

EASEMENT.

See DEED, 4.

EMBEZZLEMENT.

1. On an indictment under the Gen. Sts. c. 161, § 88, for embezzlement, the fact that the defendant, an agent employed to sell goods and authorized to receive payment therefor, is paid in part by commissions on such sales, is immaterial. *Commonwealth v. Smith*, 104.
2. If an agent, authorized to receive payment for goods sold by him on account of his employer, receives a check payable to his own order, the property in the check does not vest in him, and, if he fraudulently converts the check or its proceeds, he may be found guilty of embezzlement, under the Gen. Sts. c. 161, § 88, although, by the course of business between him and his employer, he was in the habit of depositing such checks to his credit in a bank, and sending his own checks in lieu thereof. *Id.*
3. It is no defence to an indictment for the larceny of intoxicating liquors, or to an indictment for embezzling the proceeds of the sales of such liquors, that the liquors were kept for sale, or sold in this Commonwealth, in violation of law. *Id.*
4. At the trial of an indictment for embezzlement, there was evidence that the defendant, an agent, was authorized to receive payment for goods sold by him, and was entitled to receive commissions on such sales; that he received a check, deposited it to his credit, and sent his own check for the

amount to his employer, which was not paid. *Held*, that the check sent by him was admissible in evidence; and that evidence was also admissible to show that his commissions were always paid by his employer, and that he was not authorized to deduct them from the proceeds of sales. *Commonwealth v. Smith*, 104.

EMINENT DOMAIN.

See INTEREST, 5.

EQUITY.

I. Jurisdiction and General Principles.

1. If land is sold for a tax improperly assessed, the true owner, if in possession, may maintain a bill in equity against the purchaser at the tax sale, to quiet his title. *Davis v. Boston*, 377.
2. The U. S. St. of March 1, 1847, § 2, which provides that "moneys taken from the mails" by theft or robbery, which come into the possession of any of the agents of the post-office department, shall be paid to the order of the Postmaster General, for the benefit of the rightful owner, applies to the proceeds of such moneys; and this court will not entertain a bill in equity brought by a person who had stolen money from the mails against a postmaster, to enforce a trust deed executed by the thief, by which he conveyed to the defendant the proceeds of such moneys, in trust to pay claims arising out of the theft, and to return the balance to the plaintiff. *Laws v. Burt*, 202.
3. A. conveyed land to B. and took an agreement from him by which he was to reconvey the land on the performance by A. of certain conditions in a certain time. B., after this time had expired, sold the land to C., who made expensive improvements on the land. C. did not have actual knowledge of the agreement between A. and B.; and A., though he knew of the sale, did not disclose his interest in the land, and by his conduct and statements induced C. to believe that B. had a right to sell. *Held*, that, even if the relation between A. and B. was that of mortgagor and mortgagee, A. was not entitled to the aid of a court of equity to enable him to redeem. *Tufts v. Tapley*, 380.
4. A bill in equity alleged that the plaintiff mortgaged a tract of land with a house thereon to A., and, as additional security, obtained a policy of insurance against fire, payable to the mortgagee in case of loss; that the plaintiff made a second mortgage to B., and subsequently conveyed the estate in fee to C., who assumed and agreed to pay the two mortgages; that C. afterwards conveyed the estate to D., who also assumed and agreed to pay both mortgages; that A., on receiving the amount of his note and mortgage, assigned the same, when overdue, to a bank, to hold as collateral security for the joint note of D. and E. to the bank, upon the payment of which the mortgage was assigned by the bank to E.; that the building insured was destroyed by fire, and D. and E. received a certain sum in settlement of the loss; that E. assigned the note and mortgage to F. after the plaintiff was entitled to have the insurance money indorsed

on the note; and that the estate was not sufficient for the payment of the mortgages, unless the money so received was applied in payment. The only persons named in the bill as defendants were D. and E. The prayer of the bill was that "the defendants" be ordered to indorse the insurance money on the note secured by the first mortgage, and to cancel the mortgage to that extent; and for general relief. *Held*, on demurrer, that the bill could not be maintained. *Stevens v. Hayden*, 328.

5. A. held three mortgages on a parcel of land, and there was a fourth mortgage on the same, owned one third by B. and two thirds by C. B. assigned his one third to C., who agreed that he would account to B. for one third of the profits arising out of the sale of the estate. C. then foreclosed the mortgage, and became owner of the equity of redemption. Neither B. nor C. was liable for the payment of the notes secured by the three prior mortgages held by A. On a settlement of accounts between A. and B. arising out of other transactions, B. allowed A. to charge him with one third of the interest due on the three mortgage notes, thereby reducing A.'s debt to B. A. died, leaving a will in which his wife was appointed executrix and was the residuary legatee. She gave bond in common form, and not to pay debts and legacies. After A.'s death, B. charged in his books the balance of A.'s debt to A.'s estate, and, in 1874, so informed A.'s wife, and also told her that he would allow, as a set-off against this debt, one third of the interest falling due on the three mortgage notes, so long as C. continued to pay his two thirds of the same. This arrangement was carried out, and the interest was so indorsed on the notes until 1877, leaving a considerable balance then due B. from A.'s estate. A.'s wife rendered her final account as executrix in 1874, by which it appeared that the balance was paid to her as residuary legatee, and in this balance were included the three mortgage notes. *Held*, that she was not liable in equity to B. for her husband's debt. *Clarke v. Palmer*, 373.
6. The plaintiff bought of a member of a firm shares of stock in a corporation, and took from the firm a power of attorney authorizing him to procure a transfer of the shares on the books of the corporation. The firm had at the time a large number of shares standing to its credit on the books of the corporation. The plaintiff delayed for some months to present his power of attorney to the corporation, and in the mean time the firm sold all of its shares to other persons, who obtained certificates from the corporation. *Held*, that the plaintiff was not entitled in equity, as against a partner who had no knowledge of the transactions, to a decree for the delivery to him of a certificate of the shares of stock, which had risen in value; but was entitled to a decree for the money which he had paid, with interest. *Wonson v. Fenno*, 405.
7. The rights of different persons claiming to represent a subordinate lodge of the Order of Good Templars of Massachusetts are to be determined by the constitution of the Grand Lodge, and, although a subordinate lodge has done acts which render it liable to have its charter declared forfeited by the Grand Lodge, yet, until such forfeiture has been declared, it is entitled to possession of the property of the lodge; and a bill in equity cannot be maintained against its members to recover possession of such property by

persons claiming to be recognized by the Grand Lodge as the subordinate lodge, until they have exhausted the remedies prescribed in the constitution of the Grand Lodge. *Chamberlain v. Lincoln*, 70.

8. Pending an appeal from a decree of the Probate Court disallowing a will, a compromise, under the Sts. of 1864, c. 173, and 1865, c. 186, was entered into between the executor, those claiming under the will as devisees and legatees, and those claiming the estate as intestate, by which it was agreed that all parties interested should consent to the probate of the will, that a residuary fund provided for in the will should be divided between a minor grandchild of the testator and the residuary legatees, and that the share of the grandchild should be paid to a trustee in trust to apply the income to the support and education of such grandchild until he should become of age, and then to convey the principal to him. The compromise was approved by a decree of a justice of this court sitting in equity, the person named was appointed such trustee, and the will was admitted to probate. The trustee did not give bond, and denied his obligation so to do unless ordered by this court, but claimed to be entitled to receive the share of the grandchild. The executor had in his hands the share of the grandchild ready to be paid to the person entitled to receive it in his behalf; and brought a bill in equity for the direction of the court upon the question whether or not he should pay the grandchild's share to the trustee before he should have given bond. *Held*, that the executor had a complete and adequate remedy by way of defence to any suit that might be brought against him by the trustee without having given bond; and that the bill could not be maintained. *Dodge v. Morse*, 423.
9. A testator devised property in trust to pay the income to A. for life, with remainder to his children for life, and, on their death, to pay the principal to A.'s grandchildren on their respectively coming of age. At the death of the testator A. had one child living, who was then unmarried. At the death of A., this child had children living. *Held*, that the trustee could not ask the instruction of the court on the question whether the devise to the grandchildren was void for remoteness, until the death of the child of A. *Minot v. Taylor*, 160.

See BANKRUPT, 2; INSOLVENT DEBTOR, 2; INTEREST, 5; JUDGMENT; MORTGAGE, 6; TRADE-MARK; TRUST AND TRUSTEE, 3.

II. Pleading and Practice.

10. If the allegations of a bill in equity to enforce an express trust concerning lands clearly imply that the declaration of trust was not in writing, it may be availed of by demurrer. *Campbell v. Brown*, 23.
11. If the final decree of a single justice of this court, sitting in equity, is appealed from, without a report of the evidence upon which the decree was made, the only question upon the appeal is whether the decree is warranted by the allegations of the bill. *Iasigi v. Chicago, Burlington & Quincy Railroad*, 46.
12. A decree of a single justice of this court sitting in equity, in a cause heard before him on oral evidence, and which is heard in this court on

- appeal upon a report of the same evidence only, will not be reversed on a question of fact, unless it clearly appears to be erroneous. *Boston Music Hall v. Cory*, 435.
13. Under a general exception to a master's report to the allowance of interest, the excepting party is not entitled to object to the rate of interest allowed. *Baker v. Mayo*, 517.
 14. If a corporation issues a certificate of stock to a person as trustee, and, on his death, at the request of a person claiming to be entitled to the stock, refuses to examine the evidence offered and to permit a transfer, without a decree of court, it may, on a bill in equity against it to compel a transfer, if it appears that it could easily have satisfied itself of the truth of the facts, be ordered to pay costs as well as to make the transfer. *Isigi v. Chicago, Burlington & Quincy Railroad*, 46.
 15. Land was sold under a power contained in a mortgage to the owner of the equity of redemption. At the hearing, on a bill in equity brought by a subsequent mortgagee praying that the sale should be set aside on account of fraud, and for further relief, there was evidence of fraud participated in by the purchaser, and that he was removing gravel from the land. *Held*, that the plaintiff was entitled, under the prayer for further relief, to a decree to restrain the owner of the equity from removing the gravel. *Thompson v. Heywood*, 401.
 16. A plaintiff in a bill in equity to redeem land from a mortgage, who conveys his interest in the land *pendente lite*, is not entitled to a decree. *Johnson v. Thompson*, 398.
 17. A decree of this court appointing a trustee under a will made in a county other than that in which the will is admitted to probate, but in which part of the trust estate is situated, is not void, and cannot be collaterally impeached; and it is immaterial that the petition for the appointment of the trustee presented to and acted on by the court in one county was in form addressed to the court in another county. *Bradstreet v. Butterfield*, 339.

See EQUITY, 4; INSOLVENT DEBTOR, 3.

ESTATES OF DECEASED PERSONS.

See DEVISE AND LEGACY, 10.

ESTOPPEL.

1. A grantee of land is estopped to deny the validity of a mortgage to which his deed recites that the conveyance to him is subject. *Johnson v. Thompson*, 398.
2. On a petition against a city to recover damages for the taking of land for a highway, the petitioner claimed title under a deed from the collector on a sale for taxes, and also under a deed from the collector to the city on another sale for taxes, and a release from the city of its title and interest under the collector's deed. *Held*, that the city was not estopped to deny that the petitioner had no title by reason of the invalidity of the notices of the sales. *Prentice v. Worcester*, 559.

See BANKRUPT, 2; INDIANS.

EVIDENCE.

1. In an action on an implied assumpsit to recover for board furnished the defendant, the answer alleged that the board was furnished under an express contract by a third person with the plaintiff to pay for it, and that the plaintiff afterwards brought suit against this person and recovered judgment, which was still in force. *Held*, that, under the answer, an express agreement between the plaintiff and the third person was admissible, without regard to the question of the effect of the judgment. *Massachusetts General Hospital v. Fairbanks*, 78.
2. In an action for the price of goods sold and delivered, the defendant contended that he made an entire contract for the purchase of a larger quantity than was delivered, and sought to recoup the damages he had sustained by reason of the delivery of only a part. It appeared that the contract was for the purchase of a certain number of cases of goods, and the kinds, sizes and quality of the goods were specified. The plaintiff contended that the contract was conditional on his having the goods in the stock then on hand. The defendant contended that the contract was for an absolute sale of the number of cases ordered. The evidence upon this question, and upon the question whether the plaintiff had the entire number of cases in stock, was conflicting. The defendant testified that the "sizes he ordered were the ordinary run of sizes." He was then asked, against the plaintiff's objection, "whether other sizes varying more or less from them would have been equally convenient to him in his business;" which question he answered in the affirmative. *Held*, that the admission of the question and answer afforded the plaintiff good ground of exception. *National Rubber Co. v. Sweet*, 36.
3. A carpenter, who has built houses in various places, may be allowed to testify to the cost of building a house in a town in the vicinity of those where he has worked. *Hills v. Home Ins. Co.* 845.
4. In an action against the owner of a mill on a natural stream, for injuries sustained by the owner of lands below on the same stream, in consequence of the mill-owner putting in a new wheel, the plaintiff may show what the condition of his land was before the new wheel was put in. *Clapp v. Herick*, 292.
5. In an action against the owner of a mill on a natural stream, for injuries sustained by the owner of lands below on the same stream, evidence of a former judgment in an action by the plaintiff against the grantor of the defendant for a similar injury is admissible; and parol evidence is admissible to show what was in controversy in that action. *Id.*
6. A deed of land was executed by a man and his wife to a third person, who, at the same time and as part of the same transaction, executed a deed of reconveyance of the land to the wife. *Held*, that the declarations of this third person, made after the deeds were executed, but before they were delivered, to the effect that the deeds were executed because the husband and wife feared that the land would be attached by a creditor of the husband, were inadmissible in a writ of entry against the wife by this

creditor, to whom the land was subsequently sold on execution. *Stockwell v. Blamey*, 312.

7. An authenticated copy of a return, purporting to be an enumeration by the overseers of the proprietors of Marshpee, made nearly fifty years ago, under the St. of 1818, c. 105, which is taken from the files of the Governor and Council, is admissible in evidence in a writ of entry, to prove that a person, under whom the tenant claims, and whose name does not appear on the return, was not a proprietor at the time the return was made, although the return is signed by one only of the three overseers. *Pells v. Webquish*, 469.
8. At the trial of a writ of entry, the demandant claimed under A. and the tenant under B., between whom a partition had been made in 1720, by a deed which described the dividing line as established "at two heaps of stones made on the sand near the beach bars;" the land north of that line being assigned to A., and the land south of the line to B. The monuments determining the location of the line having wholly disappeared or become uncertain, the demandant, in order to show where the "beach bars" had been, put in evidence a portion of a plan made use of by the commissioners upon a petition for partition filed in court, in 1805, by persons under whom the tenant claimed, and who were admitted by the demandant to have been the owners in fee of the land set off to B. in 1720. Upon this petition due proceedings were had, and the report of the commissioners who were appointed to make partition was accepted and confirmed by the court. *Held*, that the tenant might put in evidence the entire plan and record of the partition proceedings, and also the various deeds of the persons under whom he claimed, made after the partition in 1805 and before the year 1832, and referring to the partition. *Floyd v. Tewksbury*, 362.

See ADULTERY; ARBITRAMENT AND AWARD, 3; ATTACHMENT, 1; CONTRACT, 6, 7; CORPORATION, 3; EMBEZZLEMENT, 4; EXCEPTIONS, 3; FORGERY; GAS LIGHT COMPANY; INSANE PERSON; INTOXICATING LIQUORS, 1; LARCENY; MORTGAGE, 3; PERJURY, 2-5; PROMISSORY NOTE, 1, 5, 6; RAILROAD, 3, 8, 9; RECORD; WITNESS.

EXCEPTION.

See DEED, 3.

EXCEPTIONS.

1. This court has jurisdiction of a bill of exceptions allowed by a judge of the Superior Court to his order granting a petition for the removal of a cause into the Circuit Court of the United States, although the case has been entered in that court. *Stone v. Sargent*, 503.
2. If the finding of a judge, who tries a case without a jury, is the answer to a question framed, and the answer depends wholly on the view of the law taken by the judge on a point on which a ruling is asked, and is adverse to

the ruling asked, the whole matter is open on a bill of exceptions. *Worthen v. Cleaveland*, 570.

3. No exception lies to the admission of evidence which is competent for any purpose, if the excepting party does not ask for an instruction limiting its effect. *Commonwealth v. Wunsch*, 477.
 4. A question not raised in the court below is not open upon a bill of exceptions. *Stone v. Sargent*, 503.
 5. No exception lies to the refusal to give an instruction based on facts not appearing in the bill of exceptions. *Commonwealth v. Sargent*, 115.
- See APPEAL, 8; ATTACHMENT, 1; BREACH OF PROMISE OF MARRIAGE, 2; EVIDENCE, 2; GAS LIGHT COMPANY; PERJURY, 2, 4; PROMISSORY NOTE, 6.

EXECUTION.

1. Under the St. of 1874, c. 188, the right, title and interest of a debtor in land may be sold on execution, and such sale will pass such estate as the debtor had at the time of the attachment. *Woodward v. Sartwell*, 210.
2. At the time of an attachment of the right, title and interest of A. in land, the record title stood in his name, but he had previously conveyed the land by deed, which was recorded after the attachment and before the levy on execution. The attaching creditor had no knowledge of the deed until it was recorded. The right, title and interest in the land, which A. had at the time of the attachment, was sold on execution, under the St. of 1874, c. 188, and the deed of the officer described the land conveyed in the same manner. *Held*, that the purchaser took a good title to the land as against A.'s grantee. *Ib.*
3. It is no objection to the sale of land on execution, that it is made at the office of the officer making the sale, which office is in his dwelling-house. *Ib.*

EXECUTOR AND ADMINISTRATOR.

1. The failure of an executor, who, as sole legatee under the will, there being no creditors, is the only person interested in the disposition of the estate, to file an inventory and to render an account within the time prescribed by law, is a technical breach of his bond, which is cured by filing the inventory and rendering the account before suit on the bond. *McKim v. Harwood*, 75.
2. A., the guardian of a minor, at the time of his death, held the promissory note of B., payable on demand to his order as guardian. B. and C. were appointed executors of A.'s will, but no mention of the note was made in their inventory or accounts. C. was also appointed guardian in place of A., and several payments were subsequently indorsed upon the note, leaving a balance due. C. died and D. was appointed guardian in his stead, and he refused to receive the note as the property of his ward. B. resigned his office as executor, and E. was appointed administrator with the will annexed of the estate of A., brought an action against B. on the note,

obtained judgment and levied execution on land which B. had conveyed in fraud of his creditors. *Held*, on a writ of entry by the purchaser at the sale on execution to recover possession of the land, that the note was extinguished as a contract; that the amount due thereon having become assets in the hands of B. as executor of A., no action could be maintained upon it by E.; and that the tenant, not being a party or privy to the action by E., was not concluded by the judgment therein. *Tarbell v. Jewett*, 457.

See APPEAL, 1; DEVISE AND LEGACY, 2; EQUITY, 5, 8; INSOLVENT ESTATE; INSURANCE, 1; PRINCIPAL AND SURETY, 1.

EXPERT.

See EVIDENCE, 3.

FACTOR.

See PRINCIPAL AND AGENT, 1.

FLATS.

1. The costs of the proceedings of commissioners, appointed under the St. of 1871, c. 338, to make division of flats, are to be apportioned among the several owners thereof, according to the market value of their respective shares or interests, and not according to the area of the flats. *King, petitioner*, 413.
2. If, upon a petition under the St. of 1871, c. 338, for a division of flats, commissioners are appointed, who notify and hear all parties interested, make their surveys and plan, and report to the court, and the report and plan are approved and ordered to be recorded, and no exception is taken to the report, the objection is not open, upon the apportionment of costs of the proceedings, that the commissioners have failed to fix the boundaries of the flats wholly below mean high-water mark and not adjacent to upland held by the same owner. *Id.*

FOREIGN LAW.

See ADOPTION.

FORGERY.

An indictment, under the Gen. Sts. c. 162, § 1, charging the defendant with the forgery of an accountable receipt for money, is sustained by proof that he inserted additional words and figures in a genuine receipt for money, by which the amount originally named therein was increased. *Commonwealth v. Boutwell*, 124.

FRAUD.

See BANKRUPT, 7; EQUITY, 15.

FRAUDS, STATUTE OF.

The defendant made an oral agreement with the plaintiff for the purchase of a specific lot of skins, at an agreed price per pound for merchantable skins and another price for damaged skins, and directed a third person to see them put up, and not to take them away before a certain day, because the defendant wished to ascertain in regard to his insurance. The third person agreed to take them away on the day named, and assorted part of the skins, and then left, saying he would risk the plaintiff doing it all right. The plaintiff then assorted the rest of the skins, ascertained their weights in the usual manner, entered the weights in his books, and put all the skins apart in bundles, marked with the defendant's initials. The third person did not take them away on the day named, and they were destroyed by fire the following night. *Held*, that there was not an acceptance and receipt of the skins, within the statute of frauds. *Rodgers v Jones*, 420.

See EQUITY, 5, 10; INSURANCE, 2.

FRAUDULENT CONVEYANCE.

See EVIDENCE, 6.

GAMING.

Since the St. of 1871, c. 312, a married woman may maintain an action of tort on the Gen. Sts. c. 85, §§ 1, 2, to recover treble the amount of money lost by her husband at gaming, he not having sued for the same within three months of the loss. *Read v. Stewart*, 407.

GAS LIGHT COMPANY.

In an action against a gas company for injuries received by the plaintiff, by the inhalation of gas, which escaped from the defendant's pipes, it appeared that the plaintiff, who was too young to testify, occupied the same room and bed with his mother; that the door of the room in which they slept was broken open in the morning, and the plaintiff was found insensible by the dead body of his mother, whose death was caused by the escaping gas; that the escaping gas came from a crack in the pipe laid by the defendant through the street on which the plaintiff lived; that there were no gas fixtures in the room; and there was no evidence that the plaintiff or his mother had notice of escaping gas, or were conscious of its presence in the room in time to leave or to take any precautions to prevent the consequences by opening doors or windows. There was also evidence that, on the day before the accident, there was no smell of gas in the street; and that the mother was a sober and prudent woman. *Held*, that there was evidence sufficient to support a verdict for the plaintiff. *Held, also*, that a ruling "that there was evidence enough of want of proper care on the part of the defendant to make it responsible, on the ground that it was bound to conduct its gas in a proper manner, and that the fact that the

gas escaped was *prima facie* evidence of some neglect on the part of the defendant," was not open to exception. *Smith v. Boston Gas Light Co.* 818.

GIFT.

- 1 A deposit in a savings bank may be the subject of a gift *mortis causa*, and the gift may be proved by the delivery of the bank book, although unaccompanied by an assignment. *Pierce v. Boston Five Cents Savings Bank*, 425.
2. It is no defence to an action, by a donee of a gift *mortis causa*, to obtain the gift, that the donee is also a creditor of the estate, and that the estate is insufficient to pay his claim, without including the gift in the assets, if he is the only creditor who has not been paid. *Id.*
3. A., in contemplation of death, delivered to B. a sealed package, informing B. that it contained money and savings-bank books, with directions what was to be done with the property. On A.'s death, B. opened the package and found therein a sum of money and certain savings-bank books, with a writing signed by A., stating where he wished to be buried, and that whatever was left, besides paying all bills and expenses, was to be divided among certain persons named. *Held*, that there was a valid gift *mortis causa* to B. in trust. *Turner v. Estabrook*, 425.

See PLEADING, 1.

GOODS SOLD AND DELIVERED.

See EVIDENCE, 2; MONEY HAD AND RECEIVED, 2.

GUARDIAN AND WARD.

See EXECUTOR AND ADMINISTRATOR, 2.

HEIR.

See DEVISE AND LEGACY, 4.

HOMICIDE.

See INDICTMENT, 4.

HORSE RAILROAD.

See NEGLIGENCE, 1; RAILROAD, 7-9.

HUSBAND AND WIFE.

The St. of 1862, c. 198, making the husband of a married woman, who does business on her separate account, liable on her contracts, if no certificate is filed as therein required, does not apply to a husband domiciled in another State, whose wife does business on her separate account in this Commonwealth. *Hill v. Wright*, 296.

See DIVORCE; PRINCIPAL AND AGENT, 2.

INDIANS.

The deed of an Indian proprietor of land in the district of Marshpee, made after the passage of the St. of 1834, c. 166, to a person not a proprietor, is void, and is not made valid by the admission of the grantee to proprietorship by the St. of 1842, c. 72, nor by the removal of all disabilities from Indians by the St. of 1869, c. 463; and the heirs of the grantor are not estopped, in a writ of entry, to set up title in the land against such deed. *Pells v. Webquish*, 469.

See EVIDENCE, 7.

INDICTMENT.

1. Several counts for similar offences may be joined in one indictment. *Commonwealth v. Darling*, 112.
2. It is no misjoinder to charge in the same indictment, either in one or in several counts, one person with breaking and entering a building and stealing therein, and another person with receiving the goods stolen. *Ib.*
3. Under the St. of 1864, c. 250, an objection to an indictment, for a formal defect apparent on the face thereof, which does not affect the jurisdiction of the court, is not open, upon a motion in arrest of judgment, after a plea of guilty. *Commonwealth v. Chiovaro*, 489.
4. On an indictment against an accessory before the fact of murder, the omission in the indictment to state the legal effect of the facts particularly set forth against the principal, to define the part of the body on which the mortal wound was inflicted, and to allege the place at which the defendant was an accessory before the fact, are all formal objections not affecting the jurisdiction of the court. *Ib.*

See AUTREFOIS ACQUIT OR CONVICT; FORGERY; LARCENY; PERJURY, RAILROAD, 2.

INFANT.

See INSOLVENT DEBTOR, 1.

INSANE PERSON.

If an insane person is received into an asylum, at the request of another, and on an express contract in writing by third persons to pay his board and other expenses there, no promise can be implied on the part of such insane person to pay anything; evidence that credit was given to him by the officers of the asylum is inadmissible; and an action against him by the asylum cannot be maintained. *Massachusetts General Hospital v. Fairbanks*, 78.

INSOLVENT DEBTOR.

1. A person, against whom and his partner proceedings in insolvency have been instituted, cannot avoid them on the ground that his partner was an

infant when the proceedings were begun, if the infant was then represented by a guardian *ad litem*, and has ratified the proceedings after coming of age. *Winchester v. Thayer*, 129.

2. If the judge of the Court of Insolvency declines to entertain an application of the petitioning creditor to vacate proceedings in insolvency, because not presented at a regular meeting, and the application is withdrawn, without asking for an order of notice thereon, or giving opportunity to other creditors to come in and prosecute the proceedings, the refusal of the judge affords no ground for this court to vacate the proceedings, under the Gen. Sts. c. 118, § 18. *Ib.*
3. A judge of the Court of Insolvency should not be joined as a defendant in a bill in equity, under the Gen. Sts. c. 118, § 18, to vacate proceedings in insolvency. *Ib.*

See ATTACHMENT, 4; RECORD.

INSOLVENT ESTATE.

If the estate of a deceased person is represented insolvent, and commissioners are appointed by the Probate Court to adjudicate upon the claims of creditors against the estate, and no appeal is taken from the decision of the commissioners upon the claims presented, the neglect of the administrator of the estate to render his account within six months after the return of the commissioners, if no further time is allowed him by the court, is a breach of his administration bond, under the Gen. Sts. c. 99, § 26; the return of the commissioners, without any appeal, is "the final liquidation of the demands of the creditors," within the meaning of the statute; and the fact that a creditor presents a contingent claim against the estate, upon which no action is taken, is immaterial. *McKim v. Bartlett*, 226.

See GIFT, 2.

INSURANCE.

I. Life.

1. If a policy of life insurance contains the provision that the policy "shall not take effect until the advance premium hereon shall have been paid during the lifetime of the person whose life is hereby insured," a payment of such premium by a third person, without the knowledge of the assured, is of no effect, although made with his money; and his administrator cannot ratify the act. *Whiting v. Massachusetts Ins. Co.* 240.

II. Fire.

See MONEY HAD AND RECEIVED, 2.

III. Marine.

2. One who has made an oral contract to purchase a vessel has an insurable interest in her, notwithstanding the statute of frauds. *Amsinck v. American Ins. Co.* 185.

See PLEADING, 4.

INTENT.

See INTOXICATING LIQUORS, 1.

INTEREST.

1. If a person summoned as trustee is indebted to the principal defendant upon a demand where interest would be recoverable by the latter only as damages for breach of contract, interest will not be deemed to accrue during the pendency of the trustee process. *Smith v. Flanders*, 822.
2. In an action for money had and received, interest is to be computed only from the date of the writ, in the absence of evidence of a demand for the money before bringing suit. *Talbot v. National Bank of the Commonwealth*, 67.
3. In an action upon a foreign judgment, the plaintiff is entitled, without alleging or proving any demand, to recover interest by way of damages upon the judgment sued on, from the date of that judgment to the date of the judgment in this action, computed at the ordinary legal rate of interest in this Commonwealth. *Hopkins v. Shepard*, 600.
4. Under the St. of 1867, c. 56, § 1, if the parties to a contract stipulate for a higher rate of interest than six per cent, interest after the breach of the contract is ordinarily to be measured by the rate stated in the contract to the time of payment or of judgment. *Union Institution for Savings v. Boston*, 82.
5. By the terms of a mortgage of land in a city, the deed was to be void on the payment in five years of a certain sum and interest at the rate of seven and one half per cent per annum. The mortgagor subsequently made another mortgage to a third person, which was foreclosed; and while the first mortgage was in force the land was surrendered to, and taken by, the city, under a statute which allowed the city to make certain improvements and to assess the cost thereof upon the land, and gave any person dissatisfied with the assessment the right to surrender the land to the city. The owner of the equity of redemption filed a petition to have his damages assessed, in which the mortgagee was wrongfully allowed to join, and a new trial was ordered for this reason. On the new trial the jury assessed the value of the land at a much less sum than at the former trial. *Held*, on a bill in equity by the mortgagee against the owner of the equity of redemption and the city, that the plaintiff was entitled, out of the amount awarded, to be paid, in addition to the principal of the mortgage, interest at the rate stated therein after as well as before the time when the mortgage became due. *Id.*
6. If a savings bank agrees to pay a depositor a less rate of interest than six per cent, the plaintiff in an action to recover the deposit is only entitled to the rate agreed upon, to the date of the judgment. *Pierce v. Boston Five Cents Savings Bank*, 425.
7. Under the St. of 1862, c. 183, § 6, which provides that a collector's deed of land sold for taxes shall contain a special warranty that the sale has been conducted according to the provisions of law, and gives the purchaser the

right, if it subsequently appears that he has no claim to the property sold, by reason of informality in the proceedings, upon surrender of his deed, to the amount paid by him "together with ten per cent interest per annum on the same," "in full satisfaction of all claims for damages," interest, in an action on the covenant of warranty, may be recovered at that rate to the time of judgment. *Slocum v. Boston*, 559.

See EQUITY, 18; PARTNERSHIP, 1; PRINCIPAL AND SURETY, 1; RAILROAD, 1.

INTOXICATING LIQUORS.

1. At the trial of a complaint for the unlawful keeping of intoxicating liquor on a certain day, with intent to sell the same unlawfully, there being evidence that the defendant kept a saloon both before and after the date named in the complaint, the government may show, on the question of intent, that the defendant had liquor at his saloon a week or ten days later than that date. *Commonwealth v. Matthews*, 487.
2. An order of the selectmen of a town to an officer, directing him to cause all saloons to be closed at a certain hour, and containing an intimation of an intent to prosecute offenders against the law in certain contingencies, is not a license to sell intoxicating liquors at times and under circumstances not mentioned in the order. *Commonwealth v. Matthews*, 485.

JUDGE.

See INSOLVENT DEBTOR, 8.

JUDGMENT.

A question, which was in issue in a suit in equity, and was settled by the decree therein, cannot be tried anew in an action at law between two persons who were parties to that suit. *Powers v. Chelsea Savings Bank*, 44.

See AMENDMENT; AUTREFOIS ACQUIT OR CONVICT; BANKRUPT, 6, 7; CONSTABLE; EVIDENCE, 1, 5; EXECUTOR AND ADMINISTRATOR, 2; INTEREST, 8.

JURISDICTION.

See APPEAL, 2; CORPORATION, 2; EXCEPTIONS, 1; INDICTMENT, 8, 4; PROBATE COURT.

LANDLORD AND TENANT.

A landlord who lets rooms in a building to different tenants, with a right of way in common over a staircase, is bound to use reasonable care to keep such staircase in repair; if he fails to do so, he is liable to a tenant injured thereby while in the exercise of reasonable care; and the fact that the tenant uses the staircase after knowing that it is in a dangerous condition is not conclusive evidence that he is not in the exercise of due care. *Looney v. McLean*, 33.

LARCENY.

An indictment on the Gen. Sts. c. 161, § 15, for larceny in a building, is not sustained by evidence that the owner of the property, which was part of a stock of goods in a shop, placed the property in the hands of the defendant for inspection, who ran off with it, while the owner momentarily turned his back upon him. *Commonwealth v. Lester*, 101.

See INDICTMENT, 2.

LAW AND FACT.

See NEGLIGENCE, 2.

LEASE.

See BANKRUPT, 5; CONTRACT, 3.

LEGACY.

See DEVISE AND LEGACY.

LICENSE.

See INTOXICATING LIQUORS, 2.

LIEN.

See MECHANIC'S LIEN; RAILROAD, 1; TROVER.

LIMITATIONS, STATUTE OF.

See MORTGAGE, 6.

LOGS.

See CONSTITUTIONAL LAW, 8.

MALICIOUS PROSECUTION.

If A. brings an action upon a promissory note against B., who sets up in defence that he has paid the note and that he has a claim in set-off against A. larger than the amount of the note, and the jury return a verdict for B. under his declaration in set-off, the verdict is conclusive that A. had a cause of action against B., and the latter cannot maintain an action against A. for malicious prosecution founded upon such cause of action. *Dolan v. Thompson*, 205.

MARRIAGE.

See DIVORCE.

MARRIAGE SETTLEMENT.

See PROBATE COURT.

MARRIED WOMAN.

See **ATTACHMENT, 2, GAMING; HUSBAND AND WIFE; PRINCIPAL AND AGENT, 2.**

MASTER AND SERVANT.

1. The rule of law, that a servant cannot maintain an action against his master for an injury caused by the fault or negligence of a fellow-servant, is not confined to the case of two servants working in company, or having opportunity to control or influence the conduct of each other, but extends to every case in which the two, deriving their authority and their compensation from the same source, are engaged in the same business, though in different departments of duty; and it makes no difference that the servant whose negligence causes the injury is a submanager or foreman, of higher grade or greater authority than the plaintiff. *Holden v. Fitchburg Railroad*, 268.
2. If a master uses reasonable care in employing suitable servants, in supplying and keeping in repair suitable structures and engines, and in giving proper directions and taking due precautions as to their use, he is not responsible to one servant for the negligence of another in the management and use of such structures and engines in carrying on the master's work. *Ib.*
3. A railroad corporation is not liable to a brakeman on one of its trains for injuries suffered from the negligent setting up and use of a derrick by workmen employed in widening its railroad. *Ib.*
4. A master, whether a natural person or a corporation, is bound to use reasonable care in selecting his servants, and in keeping the engines with which, and the buildings, places and structures in, upon or over which, his business is carried on, in a fit and safe condition, and is liable to any of his servants for injuries suffered by them by reason of his negligence in this respect. *Ib.*
5. If a railroad corporation suffers a derrick, not actually in use for the purposes of its business, to remain for an unreasonable length of time, on land within its control, in such a position by the side of its track as to be in danger of being thrown down by ordinary natural causes so as to interfere with the safe passage of its trains, the corporation is liable to a brakeman for injuries resulting from its own neglect in not removing the derrick, or in not guarding against the danger of allowing it to remain, even if it was put up by other servants of the corporation, and independently of the question of their negligence. *Ib.*

MASTER IN CHANCERY.

See **EQUITY, 18.**

MECHANIC'S LIEN.

1. A person who furnishes materials, at different times, under one contract, in the erection of a building, loses his lien, under the Gen. Sts. c. 150, § 5,

if he neglects to file his statement of the amount due him within thirty days after the last item is furnished which is actually used in the erection of the building. *Gale v. Blaikie*, 206.

2. If a petition to enforce a mechanic's lien, under the Gen. Sts. c. 150, is filed in vacation, the order of notice issued under the St. of 1871, c. 78, need not be made returnable at the next term. *Worthen v. Cleveland*, 570.
3. On a petition to enforce a mechanic's lien, it appeared that the respondent agreed to convey a parcel of land to a person on condition that the latter should build a house upon the land within a certain time. This person made a contract with the petitioner to build a cellar wall warranted to stand. The wall was completed, but was afterwards injured by the action of the frost, and was repaired by the petitioner after his employer's authority to bind the respondent had ceased. The petitioner filed his statement of lien more than thirty days after he completed the wall, and within thirty days after he made the repairs. *Held*, that, if he made the repairs without the authority of the respondent, he could not enforce his lien; otherwise, if he acted in good faith to fulfil his warranty, at the request of the respondent, the latter having knowledge of the terms of the contract under which the wall was built. *Id.*

MERGER.

See MORTGAGE, 1, 5.

MILL.

See ACTION, 1; EVIDENCE, 4, 5.

MISTAKE.

See MONEY HAD AND RECEIVED, 1.

MONEY HAD AND RECEIVED.

1. If an indorser of a promissory note, relying upon a notice received from a notary public that the note has been dishonored, and, being called upon to pay the note by a subsequent indorsee, pays it to him, when in fact a proper demand has not been made upon the maker, such payment is made under a mistake of fact, and an action for money had and received will lie for the amount so paid. *Talbot v. National Bank of the Commonwealth*, 67.
2. If a merchant, who is under no obligation to procure insurance against fire upon goods which he has sold and which have not been removed from his shop, but who is obliged to procure insurance upon goods consigned to him for sale, procures a general policy of insurance upon his own goods, those consigned to him for sale, and those sold but not removed, and, upon a loss taking place, includes these three classes in his statement of loss, he is not responsible to the purchaser of goods sold but not removed for a proportionate part of the money received upon his policy of insurance, if such amount is not greater than he would have received if he had included in

his statement of loss merely his own goods and those consigned to him. *Reitenbach v. Johnson*, 316.

3. The owners of letters patent of the United States for a certain invention formed an association for the purpose of introducing the invention in Europe and obtaining patents therefor; and executed a declaration of trust, which declared that they held the property for the use of the association; and provided that no member of the association should receive any money on behalf of the association, except as authorized by the declaration of trust; that an executive committee should have the general management and control of the business; and that all votes of the association, not inconsistent with the declaration of trust, should be binding upon the trustees, the association and the executive committee. On the day this was executed, an indenture (referred to in the declaration of trust) was made between the trustees and A., a member of the association, by which A. was to sell the invention in Europe and pay over the proceeds to the trustees. No sale having been made under this indenture, the executive committee authorized one of the trustees to go to Europe and sell the letters patent for not less than a certain sum. After he had left this country in pursuance of this authority, the association, at a meeting at which the other trustee was present and acting, passed a vote authorizing the absent trustee to sell the letters patent for such sum as he should deem best, and directing the proceeds to be deposited in a bank in England to the credit of A. for the use of the shareholders. The executive committee passed a similar vote. The absent trustee, acting under these votes, made a sale in England of the letters patent, and the money therefor was paid to A. in this country by the agent of the purchaser. On the return of the trustee to this country, he demanded the money of A., who refused to pay it. This trustee subsequently made a contract with A., by the terms of which certain sums were to be paid by A. out of this money, and the balance distributed among the shareholders. *Held*, in an action for money had and received, by the trustees against A., to recover the proceeds of the sale, that, even if the votes of the association were inconsistent with the declaration of trust, the trustees had waived their right to take this objection; and that the action could not be maintained. *Smith v. Moore*, 222.

See BANK; INTEREST, 2.

MONEY PAID.

See MORTGAGE, 2.

MORTGAGE.

I. *Real Estate.*

1. Land subject to a mortgage was conveyed by the mortgagor, the grantee assuming and agreeing to pay the mortgage. The grantee subsequently conveyed the land to the mortgagee by a deed which recited that the conveyance was subject to the mortgage. *Held*, that the mortgage was thereby merged; and that the mortgagee could not maintain an action against

the mortgagor on the mortgage note, although the value of the land, at the time of the last conveyance, was less than the amount of the mortgage. *Dickason v. Williams*, 182.

2. A purchaser of land, under a power of sale contained in a mortgage, who, after he has taken possession of the land, pays a tax, assessed upon the land to a subsequent mortgagee while the latter was in possession under his mortgage, cannot maintain an action against the subsequent mortgagee to recover the amount of the tax so paid. *Swan v. Emerson*, 289.
 3. If land is sold, under a power contained in a mortgage, subject to outstanding tax titles, the mortgagee is not entitled to deduct from the proceeds of the sale money subsequently paid by him to redeem such tax titles; and evidence that it was understood and agreed, prior to the sale, between the mortgagee and the auctioneer, that the amount of the outstanding tax titles was to be deducted from the bid of the agent of the mortgagee, to whom the land was sold, is inadmissible. *Skilton v. Roberts*, 306.
 4. One who undertakes to execute a power of sale in a mortgage is bound to the observance of good faith, and to a careful regard for the interests of the mortgagor; and a mere literal compliance with the terms of the power is not enough. *Thompson v. Heywood*, 401.
 5. If the owner of the equity of redemption of land purchases at a sale made in pursuance of a power contained in a mortgage, and the sale is invalid on account of the fraud of the mortgagee participated in by the purchaser, he cannot, as against a subsequent mortgagee, set up title through the prior mortgage, but this will be deemed to have merged. *Id.*
 6. The holder of a mortgage of land assigned it as security for his own promissory note. There being a breach of the condition of the mortgage and of the assignment, the assignee brought an action to foreclose the mortgage, obtained conditional judgment for the amount of the debt due from the assignor, and on an execution obtained seisin and possession of the land. After retaining possession for three years, the assignee sold the land. *Held*, that a bill in equity by the assignor to redeem the land, brought within twenty years from such sale, but more than twenty years after possession was obtained, could not be maintained. *Stevens v. Dedham Institution for Savings*, 547.
- See ATTACHMENT, 2; BANKRUPT, 2; CASE STATED; CONTRACT, 7; DEVISE AND LEGACY, 9; EQUITY, 3-5, 15, 16; ESTOPPEL, 1; INTEREST, 5; PRINCIPAL AND AGENT, 2; TAX, 5.

II. Railroad.

See RAILROAD, 1.

MURDER.

See INDICTMENT, 4.

NATIONAL BANK.

See CORPORATION, 3.

NEGLIGENCE.

1. A passenger, who receives an injury by falling from the front platform of a street railway car while in motion, upon which he occupies a sitting position, against the rules of the corporation and the warning of the driver of the car, and without any reasonable excuse therefor, is not in the exercise of such care as will entitle him to maintain an action against the corporation. *Wills v. Lynn & Boston Railroad*, 351.
2. In an action against a religious society for a personal injury sustained by falling over a wall on the defendant's premises, there was evidence that there was a circular path, eighteen feet wide, leading from the defendant's meeting-house to the street; that one side of this path, as it approached the street, was bounded by a wall, which separated the defendant's land from a side street, and was two and a half feet high on the street; that the plaintiff, a woman, while going from the meeting-house, after dark, to the street, and walking in the manner in which she usually walked, struck her foot against the wall, at a point where it was about eight inches above the path, and fell over the wall into the side street, and was injured; and that the path was so insufficiently lighted that she did not see the wall. *Held*, that whether the plaintiff was in the exercise of due care, and whether the way was reasonably safe, were questions of fact for the jury. *Davis v. Central Congregational Society*, 367.

See ACTION, 2; CITY, 1; GAS LIGHT COMPANY; LANDLORD AND TENANT, MASTER AND SERVANT; RAILROAD, 2-6, 8, 9.

NOTICE.

See ATTACHMENT, 2; DEED, 2; EXECUTION, 2; POOR DEBTOR, 4; PRINCIPAL AND SURETY, 2; SET-OFF, 2; TAX, 6; WAY, 2.

OFFICER.

See ATTACHMENT, 1; BANKRUPT, 3; EXECUTION, 8; TROVER; TRUSTEE PROCESS.

PARTITION.

See EVIDENCE, 8.

PARTNERSHIP.

1. A partner who advances money for the use of his firm is entitled to interest upon it. *Baker v. Mayo*, 517.
2. The fact that one partner deposits, in his own name, in a bank the funds of the firm and his own funds, and draws checks thereon in payment of his private debts and the firm debts, does not preclude a finding that he is entitled to interest on money advanced by him for the use of the firm, in the absence of evidence that the firm was injured by his manner of depositing money. *Id.*

See ATTACHMENT, 8; CONTRACT, 4; EQUITY, 6; INSOLVENT DEBTOR, 1.
VOL. XV. 41

PARTY WALL.

See DEED, 5.

PATENT.

See MONEY HAD AND RECEIVED, 3.

PAYMENT.

See CONTRACT, 2; EXECUTOR AND ADMINISTRATOR, 2; INSURANCE, 1.
MONEY HAD AND RECEIVED, 1; PROMISSORY NOTE, 5, 6; SET-OFF, 1.

PERJURY.

1. An indictment against S. for perjury alleged that the defendant offered himself as bail for a person under arrest for an offence, and, on his examination before a bail commissioner, made a statement under oath that he had certain personal estate of a value not less than fifteen hundred dollars, "whereas in truth and in fact said S. did not then and there have personal estate of the value of not less than fifteen hundred dollars." *Held*, that there was a good assignment of the falseness of the statement. *Commonwealth v. Sargent*, 115.
2. If an indictment for perjury contains several assignments of the falseness of the statements alleged to be made, and one of them is sufficiently set forth, the defendant has no ground of exception to the admission of evidence applicable to all the assignments, if he does not request the evidence to be confined to the valid assignment. *Ib.*
3. If an indictment for perjury alleges that the defendant, being required "to make a written statement under oath" of his property, and, "being duly sworn, did, in pursuance of said requirement, make said statement," evidence that the defendant was not sworn until after the statement was reduced to writing is not a variance. *Ib.*
4. At the trial of an indictment for perjury, on the issue whether the defendant had made false statements as to his residence and property, it appeared, by the bill of exceptions, that "A. and other witnesses for the government" testified to facts which tended to show that the statements were false. *Held*, that the defendant had no ground of exception to the refusal of the judge to rule that there were not two sufficient witnesses to the falseness of the statements. *Ib.*
5. At the trial of an indictment for perjury, the defendant testified that a statement, alleged to be false, that he owned certain property, was true. *Held*, that he could not, in support of his testimony, put in evidence that, a short time before making the statement, he had told several persons that he owned the property. *Ib.*

PERPETUITY.

See DEVISE AND LEGACY, 6.

PLAN.

See DEED, 1.

PLEADING.

I. *Parties to Action.*

1. A donee *mortis causa* of a savings-bank book may maintain an action, in the name of the administrator of the estate of the donor, and without his consent, against the bank to recover the amount deposited. *Pierce v. Boston Five Cents Savings Bank*, 425.
2. An action upon a debt due to a bankrupt before his bankruptcy may be brought in the name of the bankrupt, with the consent and for the benefit of the assignee in bankruptcy, who is also the assignee in fact. *Mayhew v. Pentecost*, 332.

See ATTACHMENT, 2; GAMING; PRINCIPAL AND AGENT, 1.

II. *Declaration.*

See INTEREST, 3; PROMISSORY NOTE, 1; RAILROAD, 8.

III. *Demurrer.*

3. If a declaration alleges that a contract was made by A., as agent for the defendant, and sets forth facts which show that A. was not an agent, a demurrer to the declaration does not admit the fact of agency. *Everett v. Drew*, 150.

IV. *Answer.*

4. In an action on a policy of marine insurance, evidence of a deviation from the voyage insured, by an unreasonable delay in prosecuting it, is admissible under a general denial in the answer. *Amsinck v. American Ins. Co.* 185.
5. In an action upon a promissory note, the defendant's omission to deny his signature, as required by the St. of 1877, c. 163, does not prevent him, under a denial in his answer that he made the note, from contending that the note has been materially altered since he signed it, nor relieve the plaintiff from the burden of proving that the note remained in the same condition as when the signature was affixed. *Cape Ann National Bank v. Burns*, 596.

See ACCOUNT STATED; EVIDENCE, 1.

POOR DEBTOR.

1. The provision of the Gen. Sts. c. 124, § 8, that "no arrest shall be made after sunset, unless specially authorized by the magistrate making the certificate," does not apply to an arrest upon an execution for costs only. *Stone's case*, 156.

2. The St. of 1877, c. 250, does not empower a magistrate to issue a certificate authorizing the arrest of a judgment debtor, on the first charge specified in the Gen. Sts. c. 124, § 5, it not appearing that he intends to leave the State, without notice to him to appear and submit himself to an examination touching his estate, although he has made default under a notice issued by another magistrate on an application on another execution issued upon the same judgment. *Carlton v. Akron Sewer Pipe Co.* 40.
3. A debtor, who has been illegally arrested, does not by recognizing with surety before the magistrate authorizing the arrest, and submitting to examination and taking the oath for the relief of poor debtors, waive the illegality of his arrest. *Ib.*
4. A notice to a creditor, reciting that a person "arrested on execution in your favor desires to take the oath for the relief of poor debtors," and appointing a time and place for his examination, is sufficient, although the debtor was arrested on meane process only. *Calnan v. Toomey*, 451.

POST-OFFICE.

See EQUITY, 2; TAX, 4.

POWER.

See DEVISE AND LEGACY, 9, 10; MORTGAGE, 2-5.

PRINCIPAL AND AGENT.

1. If a factor, under an entire contract for a gross sum, sells goods, some of which belong to himself and some to his principal, the principal cannot maintain an action against the purchaser for the value of his goods. *Roosevelt v. Doherty*, 301.
2. A deed, containing a recital that the land therein described was subject to a mortgage "which the grantee assumes and agrees to pay," was executed to a woman as grantee, without her knowledge or authority, by the direction of her husband, and was by him recorded. She never saw the deed and knew nothing of its contents until after the land was sold by the mortgagee, when she repudiated the deed. Soon after the deed was recorded, she knew that the land had been conveyed to her, and claimed to be the owner of it. *Held*, that these facts would warrant a finding that she had assented to the purchase, and a ruling that she was bound by the recital in the deed. *Coolidge v. Smith*, 554.

See CONTRACT, 1; INSURANCE, 1; PLEADING, 3.

PRINCIPAL AND SURETY.

1. If the sureties upon an administration bond are discharged by the Probate Court, and a new bond is given to and accepted by the court, with other sureties, and there is a breach of the bond before such discharge, caused by the failure of the administrator to render his account within the time

required by law, the original sureties are not liable for the full value of the property in the hands of the administrator, if he has not misappropriated it before their discharge, but only for nominal damages, or such damages as are caused by his delay in filing an account; and if such property is lying idle and unproductive, there being no misappropriation, interest during the period of the administrator's delay to file his account is the measure of damages. *McKim v. Bartlett*, 226.

2. If a Probate Court, having jurisdiction of the subject matter, appoints a trustee, under the Gen. Sts. c. 100, § 9, without notice to all the parties interested, the sureties on the trustee's bond cannot, in an action against them on the bond, impeach the validity of the appointment. *Bassett v. Crafts*, 513.

See BANKRUPT, 3; CONSTABLE; PROMISSORY NOTE, 5.

PROBATE COURT.

By a marriage settlement made in another State, personal property was conveyed to two trustees, "and the survivor of them, his heirs, executors, administrators and assigns," on certain trusts during the joint lives of the husband and wife, with power of nomination by them in case of a vacancy in the office of trustee, and, on the death of both the husband and wife, in trust for the use of the issue of the marriage. *Held*, on the death of both trustees, and of the husband and wife leaving issue, that the Probate Court of a county in this Commonwealth, where the property then was, and where some of the issue lived, had jurisdiction to appoint a new trustee. *Bassett v. Crafts*, 513.

See APPEAL, 1, 2; PRINCIPAL AND SURETY, 2.

PROMISSORY NOTE.

1. A memorandum written at the bottom of a promissory note, before delivery, which is repugnant and self-contradictory, is not a part of the contract, and need not be set forth in the copy of the note annexed to the declaration; and parol evidence is inadmissible to show what the parties intended by the memorandum. *Way v. Batchelder*, 361.
2. If a promissory note specifies no place of payment, a presentment of it for payment at the former place of business of the maker, without any inquiry as to his place of residence, is not a good presentment to charge an indorser. *Talbot v. National Bank of the Commonwealth*, 67.
3. The owner of a stolen interest coupon payable to bearer, and which has not been paid by the promisor, is entitled to judgment in an action against the promisor, on filing a bond of indemnity, conditioned to save the defendant harmless against all lawful claims by any other person, and against all costs and expenses by reason of such claims. *Hinckley v. Union Pacific Railroad*, 52.
4. The promisor of an interest coupon payable to bearer, and distinguishable from others by a number, who, after notice that it has been stolen, pays it when overdue to the person presenting it, without any inquiry as

to his title, is liable to the true owner thereof; although the notice did not contain an offer of a bond of indemnity; although the promisor is a corporation having a very large number of such coupons outstanding, has been in the habit of paying overdue coupons as if still current, and, after the payment, gave notice to the true owner of the name of the person to whom payment had been made; and although the treasury department of the United States pays coupons on bonds, issued by the government and payable to bearer, to the person presenting them, without regard to notices that such coupons had been stolen. *Hinckley v. Union Pacific Railroad*, 52.

5. In an action by a savings bank against the surety on a promissory note, to which the defence was payment, there was evidence that the treasurer of the plaintiff bank, who was the officer in charge of its business, and the defendant were joint sureties on another note, which had been paid by the defendant, and which was signed by the same principal as the note in suit; that, on the bankruptcy of this principal, an agreement was entered into by the treasurer and the defendant, by which the treasurer should pay the note held by the bank, and the defendant should deliver to the treasurer the note paid by him, and pay the treasurer whatever on a final settlement should be found to be due; that the note held by the bank was delivered by the treasurer to the defendant and proved by him as a claim against the estate of the bankrupt, and the treasurer proved the other note as a claim held by him against the same estate, and stated to the register that the bank had received payment on the note formerly held by it. It was admitted that the note in suit was not in fact paid by the treasurer, and there was evidence that, on the death of the treasurer, the note was found with the other securities of the bank. *Held*, that this evidence constituted no defence to the action. *North Bridgewater Savings Bank v. Soule*, 528.
6. In an action against the indorser of a promissory note, payable at the plaintiff bank and discounted by another bank, it appeared that, when the note became due, the last-named bank charged it to the plaintiff bank and sent it through the clearing-house for payment; that the plaintiff's teller by mistake, thinking that the maker of the note was in funds at the plaintiff bank, stamped the word "paid" on the face of the note; that the mistake was soon discovered, and, before the close of banking hours on the same day, both the other bank and the indorser were notified of it, and the note was duly protested; and that a dispute between the two banks, as to whether the rules of the clearing-house had been complied with, was terminated by a payment of the amount of the note to the other bank by the plaintiff, without any waiver of its legal rights, and, at the trial, the other bank disclaimed all title or interest in the note. The judge, who tried the case without a jury, found that the note was stamped by mistake as paid; that this act did not amount to a payment of the note, and was not intended as such; that the money paid by the plaintiff to the other bank was not intended and did not operate as a payment of the note; and that the plaintiff had sufficient title and ownership of the note to enable it to bring this action. *Held*, that the defendant had no ground of exception.

Held, also, that the defendant could not avail himself of the rules of the clearing-house, to which he was not a party, in defence of the action. *Manufacturers' National Bank v. Thompson*, 488.

See ALTERATION OF INSTRUMENTS; BANK; CONTRACT, 4; EXECUTOR AND ADMINISTRATOR, 2; MALICIOUS PROSECUTION; MONEY HAD AND RECEIVED, 1; MORTGAGE, 1; PLEADING, 5; SET-OFF, 1.

PROTEST.

See TAX, 7.

RAILROAD.

1. By the terms of a mortgage made by a railroad corporation to trustees, to secure the payment of certain bonds with interest coupons attached, in case of default in payment of principal or interest, the trustees were to take possession of the property mortgaged for the purposes of foreclosure, and on the foreclosure becoming absolute, by such possession continuing a certain time, the bondholders might form themselves into a new corporation, with a capital stock equal to the outstanding mortgage debt, at a meeting at which each bondholder was entitled to cast one vote for "every one thousand dollars principal sum of such bonded debt held by him." It was further provided that the new corporation should consist of the holders of the mortgage bonds, "at the rate of ten shares for every bond of one thousand dollars, as said bonds shall be surrendered to said new corporation to be exchanged for certificates of stock at the rate aforesaid." While this mortgage was in force, the railroad corporation made a contract with A., by which the latter agreed that the interest maturing on a portion of the mortgage bonds should be paid at maturity; that an agreement to that effect should be indorsed on these bonds; and that any interest which A. should be obliged to pay should be and remain a valid lien on all the property secured by the mortgage. *Held*, that, upon foreclosure of the mortgage, the capital stock of the new corporation was to be determined by the principal sum of the mortgage debt, without regard to the unpaid interest; and that a holder of bonds, issued under the contract between the corporation and A., and who had received payment of interest from A., was entitled to ten shares of stock for each bond, without redeeming the coupons paid; that A. was not entitled to any stock; and that a person to whom A. had sold interest coupons when overdue had no greater rights than A. *Child v. New York & New England Railroad*, 170.
2. A passenger on a railroad left the train of cars after the conductor had called out the name of the station to which he was entitled to be carried, and the car in which he was had passed the station, and had almost stopped; and, while crossing to the station, was killed by a locomotive engine on a parallel track, the approach of which he might have seen had he looked before leaving the train. *Held*, on an indictment against the railroad corporation, under the St. of 1874, c. 872, § 163, that, if an indictment would lie for the death of a passenger not in the exercise of due care, the person

killed ceased to be a passenger by leaving the train while in motion. *Commonwealth v. Boston & Maine Railroad*, 500.

8. In an action against a railroad corporation, under a declaration alleging that the plaintiff, while travelling on the highway, was injured at a grade crossing "by reason of the carelessness and negligence of the agents and servants of the defendant," the jury may consider whether, under all the circumstances of the case, the defendant was guilty of negligence in not having a gate or a flagman at the crossing, although never requested by the selectmen of the town, nor ordered by the county commissioners, to do so, under the St. of 1874, c. 372, § 126. *Eaton v. Fitchburg Railroad*, 364.
4. A person, who is injured while crossing the tracks of a railroad corporation at a place not a highway, and where no inducement is held out to him to cross by the corporation, cannot maintain an action against the corporation for such injury. *Wright v. Boston & Maine Railroad*, 440.
5. A person, who is injured by a train of cars at a place where a highway crosses a railroad at grade, cannot maintain an action against the railroad corporation, if it appears in evidence, undisputed, that he attempted to cross on foot, without looking to see if a train was coming. *Ib.*
6. An action for personal injuries cannot be maintained against a railroad corporation, under the St. of 1874, c. 372, § 164, if the declaration does not allege that the accident occurred upon a crossing of a highway at grade, that the statutory signals required at such crossings were neglected by the defendant, and that such neglect contributed to the injury. *Ib.*
7. It is a reasonable regulation of a street railway corporation, which it has the right to make, that passengers shall not be on the front platform of a car. *Wills v. Lynn & Boston Railroad*, 351.
8. In an action against a street railway corporation, a declaration alleging that the plaintiff was injured by a car of the defendant being carelessly driven upon and over him, is not supported by proof that the plaintiff was injured by another car, not carelessly driven, in attempting to escape from a car which was carelessly driven. *Hanlon v. South Boston Horse Railroad*, 310.
9. In an action against a street railway corporation, for an injury caused by a car being carelessly driven upon and over the plaintiff, the fact that, at the time of the injury, the car was being driven at a rate of speed prohibited by a city ordinance, although evidence of negligence on the part of the corporation, is not conclusive evidence of such negligence. *Ib.*

See CORPORATION, 2; MASTER AND SERVANT, 3, 5; NEGLIGENCE, 1.

RATIFICATION.

See INSURANCE, 1.

RECEIVER OF STOLEN GOODS.

See INDICTMENT, 2.

RECORD.

The record of a Court of Insolvency, as made up or amended by direction of the judge, cannot be contradicted by parol evidence upon a petition to this court, under the Gen. Sts. c. 118, § 16, to vacate the proceedings. *Winchester v. Thayer*, 129.

See APPEAL, 3; DEED, 2; EVIDENCE, 7; EXECUTION, 2.

RELEASE.

See CONTRACT, 4.

RELIGIOUS SOCIETY.

See ACTION, 2; NEGLIGENCE, 2; TAX, 2.

REMOVAL OF ACTION.

1. The right of a citizen of another State to remove into the Circuit Court of the United States a suit between himself and a citizen of the State in which the suit is brought, at any time before the trial, upon making affidavit of his belief and reason to believe that from prejudice or local influence he will not be able to obtain justice in the State court, given by former acts of Congress, is not taken away by the act of March 8, 1875. *Stone v. Sargent*, 503.
2. A hearing before an auditor is not a "trial," within the meaning of the U. S. Rev. Sts. § 639, cl. 3, giving the right to remove a cause before trial from a State court into the Circuit Court of the United States; and consent to the appointment of an auditor is no waiver of such right of removal. *Ib.*

See EXCEPTIONS, 1.

RENT.

See BANKRUPT, 5.

REPORT.

Under the St. of 1878, c. 231, § 1, a judge of the Superior Court has no power to report to this court a case heard without a jury, without making any decision in matter of law, or entering of record a finding upon the facts, equivalent to the verdict of a jury, upon which judgment may be rendered. *Terry v. Brightman*, 535.

RESERVATION.

See DEED, 3.

RIVER.

See CONSTITUTIONAL LAW, 3.

RULES OF COURT.

See AMENDMENT.

SALE.

See CONTRACT, 1; FRAUDS, STATUTE OF; MONEY HAD AND RECEIVED, 2; PRINCIPAL AND AGENT, 1.

SAVINGS BANK.

See BOND, 1; CONSTITUTIONAL LAW, 1; GIFT, 1, 3; INTEREST, 6; PLEADING, 1; PROMISSORY NOTE, 5; SET-OFF, 2.

SET-OFF.

1. In an action against the executor of the maker of a promissory note, not negotiable, which had been assigned to a third person before maturity, for whose benefit the action was brought, it appeared that the defendant's testator had indorsed another promissory note for the accommodation of the nominal plaintiff, which note was due at the time the note in suit was given, but was not paid by the defendant until after notice to the testator of the assignment of the note in suit. *Held*, that the defendant could not, under the Gen. Sts. c. 130, set off this note, although the plaintiff in interest knew when he took the note in suit that the payee was insolvent. *Held* also, that these facts, together with the facts that the assignee of the note was warned by the defendant not to take the note, and that the nominal plaintiff was not called as a witness at the trial, would not warrant the jury in finding that the parties to the note in suit agreed that the amount which the testator might be called on to pay on the accommodation note should be in part payment of the note in suit. *Backus v. Spaulding*, 234.
2. An assignee of a deposit in a savings bank can set off the same, under the St. of 1878, c. 261, against a claim of the bank, without a previous notice to the bank of the assignment. *North Bridgewater Savings Bank v. Soule*, 528.

See CONSTITUTIONAL LAW, 1; MALICIOUS PROSECUTION.

SHIP.

See CITY, 1; INSURANCE, 2.

STATUTE.

See ATTACHMENT, 4; CONSTITUTIONAL LAW; EQUITY, 2; HUSBAND AND WIFE; RAILROAD, 6.

STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS.

See MORTGAGE, 6.

STATUTES CITED, EXPOUNDED, ETC.

ENGLISH STATUTES.

20 Hen. III. c. 9.	Bastard	252
5 Eliz. c. 14.	Forgery	124
4 Geo. II. c. 21.	Foreign-born Children	249
7 Geo. II. c. 22.	Forgery	125

STATUTES OF THE UNITED STATES.

March 2, 1793, § 5.	Injunction	507
August 19, 1841, § 3.	Bankrupt	335
March 1, 1847, § 2.	Postal Service	202
March 2, 1867.	Removal of Action	505
June 8, 1872.	Postal Service	203
March 8, 1873.	Boston Post-Office	64
June 22, 1874, § 17.	Bankrupt	1, 7, 519
February 16, 1875, § 3.	Review	508
March 8, 1875.	Removal of Action	508

REVISED STATUTES OF THE UNITED STATES.

§ 639, cl. 3.	Removal of Action	508
§ 691.	Writ of Error	508
§ 709.	" "	507
§ 720.	Injunction	507
§§ 4050-4058.	Postal Service	203
§ 5044.	Bankrupt	12, 283
§§ 5044-5047.	"	334
§ 5046.	"	13, 283
§§ 5087, 5114, 5119.	"	63
§ 5103.	"	9
§ 5139.	"	279

STATUTES OF NEW YORK.

1873, c. 830.	Adoption	262
---------------	----------	-----

STATUTES OF NEW JERSEY.

Rev. Sta. 1877, § 1345.	Adoption	262
-------------------------	----------	-----

STATUTES OF PENNSYLVANIA.

1855, c. 456.	Adoption	262
---------------	----------	-----

STATUTES OF MISSISSIPPI.

1846.

Adoption

262

PROVINCIAL STATUTES.

1708 (1 & 2 Anne) c. 12, § 1. Executor and Administrator 465

STATUTES OF THE COMMONWEALTH.

1788, c. 40. Dower	418	1869, c. 418. Dower	419
1814, c. 165. Constable	68	— c. 438. Report	538
1817, c. 87. Equity	848	— c. 463. Indians	469
— c. 190, §§ 87, 88, 40, 41.		1870, c. 75. Way	186
Probate Court	843	— c. 194. Trustee Process	444
1818, c. 105, §§ 1, 5. Indians	471	— c. 293. Mashpee	471
1827, c. 77, §§ 11, 12. Way	187	1871, c. 78. Lien	570
1832, c. 180, § 5. Report	537	— c. 310. Adoption	263
— c. 147. Descent	258	— — — § 8. “	267
1834, c. 166, §§ 9, 12 Marshpee	471	— c. 312. Married Woman	407
1838, c. 168, § 5. Insolvency	336	— c. 338. Flats	413
1839, c. 158. Corporation	446	— c. 352. Railroad Crossing	443
1842, c. 72. Marshpee	469	1872, c. 155. Katama Land Co.	543
1843, c. 19. Trust	843	1873, c. 156. Assessor	577
1851, c. 324, §§ 1-6. Adoption	263	— c. 189. Boston Post-Office	64
1852, c. 29. Alien	259	— c. 261. Superior Court	185
— c. 212. Trustee	343	— c. 297, § 1. Attachment	31
1853, c. 253. Bastard	259	1874, c. 188. Execution	30, 210
1854, c. 24. Adoption	263	— c. 259. Warren Bridge	594
1855, c. 449. Superior Court	538	— c. 293. Bristol District	
1856, c. 284, § 5. Insolvent	563	Courts	31
1859, c. 196, § 32. Report	538	— c. 372, § 126. Railroad	364
1860, c. 70. Attachment	32	— — — § 163. “	500
— c. 78. Insolvent	563	— — — § 164. “	440
1862, c. 183, § 3. Tax	568	1876, c. 213, § 11. Adoption	263
— — — § 6. “	559	— c. 220. Descent	266
— c. 198. Married Woman	296	1877, c. 97, §§ 1, 2. Bond to	
1863, c. 25. Trust	342	dissolve Attachment	590
1864, c. 168. “	342	— c. 163. Proof of Signa-	
— c. 178. Estates of Deceased		ture	596
Persons	423	— c. 234. Way	535
— c. 201. Corporation	436	— — — §§ 3, 4. Way	526
— c. 250, §§ 2, 3. Indict-		— c. 250. Poor Debtor	40
ment	497 n.	1878, c. 78. Savings Bank	533
— c. 306. Flats	415	— c. 229. Tax Sale	560
1865, c. 186. Estates of Deceased		— c. 231, § 1. Report	535
Persons	423	— — — § 2. “	538
1867, c. 56, §§ 1, 2. Interest	86	— c. 261. Savings Bank	523
1869, c. 276, § 1. Corporation	181	1880, c. 246, § 7. Insolvent	591

REVISED STATUTES.

c. 8, §§ 3, 7, 11, 15, 19. Tax	290	c. 96, §§ 1-11. Set-Off	337
c. 61, § 4. Bastard	258	c. 102, §§ 2-5. Dower	418
c. 69, §§ 1, 2, 4, 7-9. Trust	343	c. 117, § 7. Lien	572
c. 76, § 40. Divorce	248	c. 120, § 4. Statute of Limitations	336
c. 81, § 8. Equity	343	c. 188, § 12. Report	537
— § 26. Report	537		

GENERAL STATUTES.

c. 11, § 5, cl. 3, 7. Tax	178	c. 100, §§ 1, 7-9, 11, 14, 17, 22. Trust	342
— § 8. " 378, 566		— §§ 2, 4. " 344	
— § 52. " 577		— § 9. " 513	
— § 53. " 377		— § 19. " 25	
c. 12, §§ 3, 7, 13, 19. " 290		c. 101, §§ 18, 28, cl. 4. Administration Bond	229
— §§ 8, 22. " 290		c. 103, §§ 1-8, 33-40. Execution	213
— § 28. " 379		— § 29. " 342	
— §§ 28-30. " 553, 560		c. 105, § 1. Statute of Frauds	376
— § 33. " 560		— § 5. " " 422	
— § 35. " 567		— § 6. " " 374	
— §§ 39-41. " 291		c. 107, §§ 54, 55. Divorce	18
— § 56. " 551		— § 55. " 248	
c. 18, §§ 31-34. Town	578	c. 110, §§ 1-8, 13. Adoption	263
— § 53. Assessor	578	c. 112, § 20. Supreme Judicial Court	537
c. 32. Corporation	181	c. 113, § 2. Equity	348
c. 43, § 19. Way	136	— § 15. Supreme Judicial Court	537
— § 24. " 187		c. 114, § 10. Appeal	159
— § 57. " 138		c. 115, § 6. Report	538
c. 44, § 20. " 136		— § 7. Exceptions	159
c. 56, § 1. Trade-Mark	326	c. 117, §§ 8, 16. Probate Appeal	527
c. 57, §§ 137, 138. Savings Bank		c. 118, §§ 1, 6. Insolvency	133
Treasurer	73	— § 16. " 129	
c. 63, §§ 86-89. Railroad	365	— §§ 4, 130. " 134	
c. 68, §§ 10, 12. Corporation	436	— § 44. " 592	
— § 15. " 446		— §§ 44, 47. " 336	
c. 78, § 5. Connecticut River	580	— § 48. " 534	
c. 85, §§ 1, 2. Gaming	407	c. 121, § 46. Auditor	300, 512
c. 89, § 3. Conveyance	567	c. 123, § 2. Venue of Action	342
c. 90, § 38. Alien	259	— § 30. Service	449
c. 91, § 1. Descent	266	— §§ 51, 52. Attachment	30
— § 4. " 259		— § 54. " 82	
c. 98. Executor and Administrator	527	— §§ 59-61. " 436	
c. 99, § 1. Insolvent Estate	434, 456		
— § 26. Estates of Deceased Persons	226		

c. 128, §§ 62, 63. Attachment	142	c. 142, § 1. Trustee Process	446
—— § 87, 88. “	127	—— § 5. “ “	449
—— § 89. “	129	—— § 21. “ “	579
—— § 104. “	590	c. 150, §§ 1, 5, 6. Lien	209
c. 124, § 5. Poor Debtor	40	—— §§ 8, 9, 14. “	572
—— §§ 5-8. “ “	157	c. 151, § 9. Pledge	283
—— § 12. “ “	452	c. 155, § 4. Statute of Limita- tions	886
c. 129, §§ 2, 13, 17, 20, 27. Pleading	51	c. 161, § 15. Larceny	101
—— § 5. “	366	—— § 38. Embezzlement	104
—— § 17. Answer	188	—— § 42. Evidence	110
—— § 41. Amendment	600	c. 162, § 1. Forgery	124
c. 130. Set-Off	534	c. 168, § 5. Accessory	497
—— §§ 1-10. “	236	c. 171, § 19. Homicide	497
c. 133, § 46. Levy	436	c. 173, § 8. Report	537
c. 135. Dower	417	c. 176, §§ 1, 2. Fines	578
c. 136. Partition	415	c. 181, § 2. Statute	341
c. 140, §§ 23, 43. Mortgage	342		

STREET RAILWAY.

See NEGLIGENCE, 1; RAILROAD, 7-9.

SUPERIOR COURT.

See AMENDMENT; APPEAL, 3; EXCEPTIONS, 1; REPORT.

SUPREME JUDICIAL COURT.

See APPEAL, 1; EXCEPTIONS, 1; REPORT.

TAX.

1. A tax on real estate may be assessed to a person who appears by the records to be the owner, if the municipality assessing the tax has no notice that he has previously conveyed the land. *Tucker v. Deshon*, 559.
2. Land owned by a religious corporation, upon which no church edifice has been or is intended to be erected, and which is separated by a passageway from the portion of the estate on which the church of the corporation stands, and which is not necessary or incidental to the use of the church as a house of public worship, is not exempt from taxation, under the Gen. Sts. c. 11, § 5, cl. 7. *Redemptorist Fathers v. Boston*, 178.
3. The fact that a benevolent or charitable corporation intends at some indefinite future time to occupy land owned by it for the purposes for which it was incorporated, does not exempt the land from taxation, under the Gen. Sts. c. 11, § 5, cl. 3. *Id.*
4. Although by the provisions of the U. S. St. of March 3, 1873, and of the St. of 1873, c. 189, the title in land taken by the United States for a post-office in Boston did not vest in the United States until the assessment and

payment of damages thereby occasioned, yet the title taken was that which existed when the petition for the valuation of the land was filed by the agent of the government; and the owner is not chargeable with taxes and betterments assessed upon the land while the proceedings upon such petition were pending. *Sherwin v. Wigglesworth*, 64.

5. Real estate in the possession of a mortgagee, the equity of redemption of which had been conveyed, was improperly taxed to the mortgagor. It was afterwards sold and conveyed under a power of sale in a second mortgage; and the tax was subsequently reassessed, under the Gen. Sts. c. 11, § 58, to the holder of the equity, based upon a valuation other than that of the year for which the tax was originally assessed. *Held*, that the reassessment was invalid. *Davis v. Boston*, 377.
6. A notice from a city treasurer, that it is his duty to enforce the payment of a tax on land by sale unless the tax is paid forthwith, is not "a notice of sale" within the Gen. Sts. c. 12, § 56. *Knowles v. Boston*, 551.
7. A person paying a tax stated orally to the clerk of the treasurer of a city that he paid it under protest, and wished the clerk to make a note of it. The clerk, acting under instructions from the treasurer to make a note of all protests, written or oral, wrote upon the receipt given for the tax that it was paid under protest, and made a memorandum to that effect on the books of the treasurer. *Held*, that there was not "a protest in writing" by the person paying, within the Gen. Sts. c. 12, § 56. *Ib.*

See CONSTITUTIONAL LAW, 2; EQUITY, 1; ESTOPPEL, 2; INTEREST, 7; MORTGAGE, 2, 3.

TENDER.

See BANKRUPT, 8.

TIME.

See INTOXICATING LIQUORS, 1; TRIAL.

TOWN.

See CITY; TRUSTEE PROCESS; WAY.

TRADE-MARK.

Numerals, arbitrarily selected, and used on goods in combination with other devices to denote the origin of the goods, and not their quality, are a valid trade-mark; and a person who uses them, in combination with other devices which he has a right to use, may be restrained by a bill in equity from so using them, if he does so for the purpose of imitating the trade-mark, and his use is calculated to deceive, and does deceive, persons buying his goods. *Laurence Manuf. Co. v. Lowell Hosiery Mills*, 325.

TRIAL.

An indictment for abortion alleged that the act was committed on the 7th of a certain month. The principal witness for the government testified

that the act was committed on the day alleged, and that the woman died on the next day; and gave a circumstantial account of all that took place between the commission of the act and the death. Several witnesses, including the medical attendant, testified that the death occurred on the 9th of the month. The defendant put in evidence tending to prove that he was out of the State during the whole of the 7th. *Held*, that the attorney for the government was properly allowed to argue to the jury that the act was committed on a day other than the 7th. *Commonwealth v. Baldwin*, 481.

TROVER.

An officer, who has attached the property of one person on a writ against another person, cannot set up, in bar of an action of trover against him by the owner, that the property when attached was in the possession of a carrier who had a lien upon it for freight. *Stearns v. Dean*, 189.

See CONTRACT, 1; CORPORATION, 3.

TRUST AND TRUSTEE.

1. A new trustee under a will, appointed by this court, under the Gen. Sta. c. 100, § 9, is not required to give a bond, unless such bond is required of him by the will, or by the order of the court appointing him. *Bradstreet v. Butterfield*, 389.
2. If a person, acting as trustee for others, makes a contract in his own name, his *cestuis que trust* are not liable thereon, although the fact that he is a trustee is not known to the person with whom he makes the contract at the time it is made. *Everett v. Drew*, 150.
3. A bill in equity, against the administrator and heirs of W., alleged that C., an uncle of the plaintiff, who, at the time of his death, was supporting the plaintiff, then an infant and an orphan, in the family of W., his brother-in-law, and who died without making a will, intended to make the plaintiff "the heir at law of one full half of all his property and estate;" that on his death-bed he gave direction that one half the same should be the property of the plaintiff; that the plaintiff's name should be changed; that W. should be appointed his guardian; that, after the settlement of C.'s estate, C.'s father, who was sole heir at law, "being desirous of carrying into full effect the intentions and wishes of his deceased son in relation to the plaintiff," at the instance and suggestion of F., who was the owner of one undivided half of certain land in another State, the title to the whole standing in the name of C. alone, and also at the instance of W., who had been appointed guardian of the plaintiff, executed and delivered a deed of this land to F., to C.'s administrator and to W., as copartners; that neither C.'s administrator nor W. paid any consideration for this conveyance, and that it was not the intention of the parties that W. should take any title therein in his own right, but only in his representative capacity; that he "never claimed any personal interest in said land, but only as the guardian of the plaintiff, and as holding under said deed in trust for the use and benefit of the plaintiff. *Held*, on demurrer,

that the bill did not set forth any ground upon which to raise an express, implied, resulting or constructive trust for the benefit of the plaintiff; and that the bill could not be maintained. *Campbell v. Brown*, 28.

See CONTRACT, 7; DEVISE AND LEGACY, 5, 6, 8; EQUITY, 2, 9, 10, 17; GIFT, 8; MONEY HAD AND RECEIVED, 8; PRINCIPAL AND SURETY, 2; PROBATE COURT.

TRUSTEE PROCESS.

A town cannot be charged as trustee of an assessor of taxes, to whom no compensation has been voted, additional to that provided by the Gen. Sts. c. 11, § 52, as amended by the St. of 1873, c. 156. *Walker v. Cook*, 577.

See BOND, 2; CORPORATION, 2; INTEREST, 1.

VARIANCE.

See FORGERY; PERJURY, 3; RAILROAD, 8.

VERDICT.

See MALICIOUS PROSECUTION.

VOTE.

See MONEY HAD AND RECEIVED, 8.

WAIVER.

See MONEY HAD AND RECEIVED, 8; POOR DEBTOR, 8; REMOVAL OF ACTIONS, 2.

WAY.

1. A boy coasting upon a hand-sled is not a defect or want of repair in a highway, for which a city is liable to a person struck by the moving sled. *Pierce v. New Bedford*, 534.
2. If the notice required by the St. of 1877, c. 234, to be given to a city or town in case of an injury by a defect in a highway, is not given within thirty days thereafter, the burden of proof, in an action by the person injured against the city or town, is on the plaintiff to show that he was so physically or mentally incapacitated that he could not give the notice within the thirty days either by himself or by some other person in his behalf. *Mitchell v. Worcester*, 525.

See CITY, 2; COSTS; DEED, 4; ESTOPPEL, 2.

WIDOW.

See DOWER.

WILL.

See DEVISE AND LEGACY.

WITNESS.

If a witness testifies to a fact, which it appears, on cross-examination, he does not know of his own knowledge, his testimony is incompetent, and the witness cannot be contradicted by evidence that he has incorrectly stated his information. *Commonwealth v. Matthews*, 485.

See TRIAL.

WORDS.

- "Commerce." See *Harrigan v. Connecticut River Lumber Co.* 580, 585.
- "Excepting." See *Stockwell v. Couillard*, 231, 233.
- "Mayor." See *Dunbar v. Soule*, 284.
- "Navigation." See *Harrigan v. Connecticut River Lumber Co.* 580, 585.
- "Part-owner." See *Breck v. Blair*, 127.
- "Passenger." See *Commonwealth v. Boston & Maine Railroad*, 500.
- "Protest." See *Knowles v. Boston*, 551.
- "Reserving." See *Stockwell v. Couillard*, 231, 233.
- "Trial." See *Stone v. Sargent*, 503, 512.

WORK AND LABOR.

See MECHANIC'S LIEN.

WRIT.

See CORPORATION, 2.

WRIT OF ENTRY.

See CASE STATED; EXECUTOR AND ADMINISTRATOR, 2.

HARVARD LAW LIBRARY

